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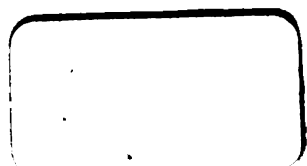
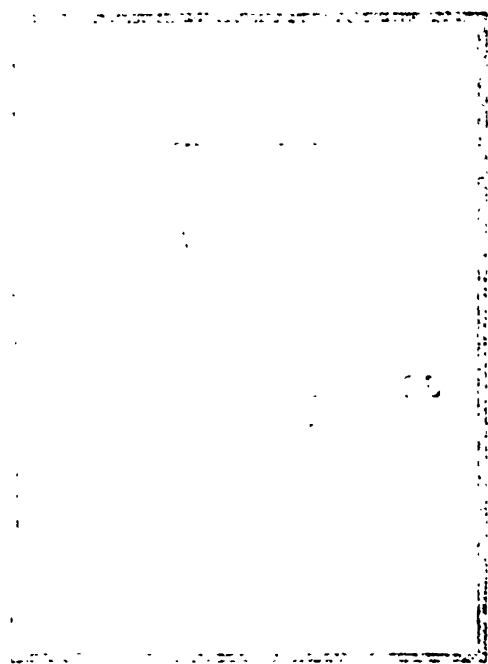
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# REPORTS

OF

CASES AT LAW AND IN EQUITY

DETERMINED BY THE

# SUPREME COURT

OF THE

STATE OF IOWA.

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APRIL 6, 1899—MAY 26, 1899.

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BY

BENJ. I. SALINGER.

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VOLUME IX,

BEING VOLUME CVIII. OF THE SERIES.

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*Rec. Dec. 5, 1900*

# JUDGES OF THE SUPREME COURT

DURING THE TIME OF THESE REPORTS

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GIFFORD S. ROBINSON, SIOUX CITY, *Chief Justice.*

CHAS. T. GRANGER, WAUKON.

JOSIAH GIVEN, DES MOINES.

SCOTT M. LADD, SHELDON.

CHARLES M. WATERMAN, DAVENPORT

HORACE E. DEEMER, RED OAK.

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## OFFICERS OF THE COURT.

MILTON REMLEY, IOWA CITY, *Attorney General.*

C. T. JONES, WASHINGTON, *Clerk.*

BENJ. I. SALINGER, CARROLL, *Reporter.*

# JUDGES OF THE COURTS

FROM WHICH APPEALS MAY BE TAKEN TO THE SUPREME COURT.

## DISTRICT COURTS.

*First District*—HENRY BANK, JR., Keokuk.

*Second District*—ROBERT SLOAN, Keosauqua; M. A. ROBERTS, Ottumwa; T. M. FEE, Centerville; F. W. EICHELBERGER, Bloomfield.

*Third District*—H. M. TOWNER, Corning; W. H. TEDFORD, Corydon

*Fourth District*—GEO. W. WAKEFIELD, Sioux City; F. R. GAYNOR, Le Mars; JOHN F. OLIVER, Odawa; WM. HUTCHINSON, Orange City.

*Fifth District*—J. H. APPELEGATE, Guthrie Center; A. W. WILKINSON, Winterset; JAMES D. GAMBLE, Knoxville.

*Sixth District*—JOHN T. SCOTT, Brooklyn; W. G. CLEMENTS, Newton; A. R. DEWEY, Washington.

*Seventh District*—W. F. BRANNAN, Muscatine; P. B. WOLFE, Clinton; A. J. HOUSE, Maquoketa; JAMES W. BOLLINGER, Davenport.

*Eighth District*—MARTIN J. WADE, Iowa City.

*Ninth District*—W. F. CONRAD, CALVIN P. HOLMES, CHARLES A. BISHOP, S. F. PROUTY, Des Moines.

*Tenth District*—A. S. BLAIR, Manchester; FRANK C. PLATT, Waterloo.

*Eleventh District*—J. R. WHITAKER, Boone; S. M. WEAVER, Iowa Falls; BENJAMIN P. BIRDSALL, Clarion.

*Twelfth District*—JOHN C. SHERWIN, Mason City; J. F. CLYDE, Osage, C. H. KELLEY, Forest City.

*Thirteenth District*—L. E. FELLOWS, Lansing; A. N. HOBSON, West Union.

*Fourteenth District*—WILLIAM B. QUARTON, Algona; F. H. HELSELL, Sioux Rapids.

*Fifteenth District*—A. B. THORNELL, Sidney; WALTER I. SMITH, Council Bluffs; N. W. MACY, Harlan; W. R. GREEN, Audubon.

*Sixteenth District*—S. M. ELWOOD, Sac City; Z. A. CHURCH, Jefferson.

*Seventeenth District*—GEORGE W. BURNHAM, Vinton; OBED CASWELL, Marshalltown.

*Eighteenth District*—H. M. REMLEY, Anamosa; WILLIAM G. THOMPSON, Kenwood Park; WILLIAM N. TREICHLER, Tipton.

*Nineteenth District*—FRED O'DONNELL, Dubuque; MATHEW C. MATH-  
EWS, Dubuque.

*Twentieth District*—JAMES D. SMYTH, Burlington; WINFIELD S. WITH-  
ROW, Mt. Pleasant.

## SUPERIOR COURTS.

*Cedar Rapids*—THOMAS M. GIBERSON.

*Council Bluffs*—E. E. AYLESWORTH.

*Keokuk*—RICE H. BELL.

## IN MEMORIAM.

### JAMES H. ROTHROCK.

On the fourteenth day of January, 1899, James H. Rothrock, for many years a justice of this court, and several times its chief justice, departed this life, at his home in Cedar Rapids.

On May 17, 1899, the occasion being a ceremonial in honor of his memory before said court, Hon. N. M. Hubbard, offering resolutions on part of the bar of the state, spoke as follows:

#### MAY IT PLEASE THE COURT:

This is my forty-sixth year in practice. I have known all the judges whose likenesses hang on this wall, and have been permitted to practice before all of them except four who were earlier than my time.

The services for which we have met probably come closer to me than those that have been held for almost any other man who has occupied a position on this bench. I must say only one thing before proceeding, I am very proud of the fact that in my judgment this court has not deteriorated from the time I first knew it, and that its judgments and opinions still command the respect and the confidence of the bar of the United States, as I believe. (Reading resolutions.)

At a meeting of a large number of the members of the bar from different portions of the state, held on the 17th day of January, 1899, the undersigned were appointed a committee to express the sentiment and appreciation of the bar for the life, character and services of Mr. Justice Rothrock, long a judge of this court and of the district court of the Eighth judicial district.

Judge James H. Rothrock was a district judge for nine years, and for twenty-one years a justice and chief justice of this court.

During the civil war he was a gallant and able officer in the defense of the Union.

He was one of our first citizens, he was a kind husband and father, a staunch friend and won the love and confidence of all.

His ability and integrity were never questioned. In every position of trust and confidence to which he was called by the people he always, and under all circumstances, performed his duty with unswerving fidelity, with a clear and unbiased judgment and wholly uninfluenced by public clamor or personal considerations.

His thirty years of service upon the bench of this state were rendered during the formative period of Iowa jurisprudence, and no one judge has done more to establish a firm, dignified and clear exposition of the law than he.

His opinions, contained in sixty-one volumes of the Iowa reports, are models of clear analysis, forceful expression and strong good sense.

His whole life and character were an honor alike to the people whom he served and the positions he has graced so long and so well as a just and upright judge. He will long be remembered by the people of Iowa as a man of true eminence in every relation of life. He has gone away, though we trust the good he has done will long live after him, and continue to benefit mankind when all of us here who mourn him shall have been forgotten.

All of which is respectfully submitted and asked to be spread upon the records of this court.

(Signed)

H. H. TRIMBLE,  
SMITH MCPHERSON,  
W. J. KNIGHT,  
WM. G. THOMPSON,  
CARROLL WRIGHT,  
MILO P. SMITH,  
N. M. HUBBARD.

MAY IT PLEASE THE COURT:

In the absence of Judge Trimble, it becomes my duty to present to this court the appreciation of the bar of Mr. Justice Rothrock.

About the 1st of September last, the Judge was taken ill with heart trouble. Soon afterwards he received a note from Mr. Nelson W. Evans, of Portsmouth, Ohio, with whose father Judge Rothrock studied law many years ago. Mr. Evans was writing a book giving a short account of all the lawyers who had lived in Adams county, Ohio. Judge Rothrock wrote him a note referring him to Hon. H. H.

Trimble, Hon. Smith McPherson and myself for a sketch of his life. I wrote the following and submitted it to my friends, Trimble and McPherson, who approved it. I then submitted it to Judge Rothrock himself something over a month before he died, and in his modest way he barely said, "It is satisfactory."

I am conscious that much more and better could and ought to be said, but trust it is sufficient to indicate in some degree the goodness and greatness of the man.

I have thought it best not to change in the least the sketch which I submitted to Judge Rothrock himself. It is unusual for a man to see a sketch of this kind before he passes away. Probably three or four days prior to his last illness we were riding together from my farm near Cedar Rapids, and after a somewhat long pause in the conversation, he said to me: "Hubbard, I have been going to say something to you for sometime, and it is this: If I should pass away first, I wish you to write a sketch of my life, and I will do the same for you should I survive you." I told him I had intended to do that in any event, and so, when this letter came from Mr. Evans, I saw the opportunity to write that sketch and submit it to him, which I did, and therefore I purpose reading the precise language of the sketch, and it is this: (Reading)

James H. Rothrock came to Iowa in 1860 and settled in Cedar county. He at once acquired good standing at the bar. In 1861 he was elected to the legislature and was a prominent member of that body. He was noted as a young man for his good judgment, candor, dignity and fairness.

In 1862 he went into the military service and was appointed lieutenant colonel of the Thirty-fifth Iowa volunteer infantry. He took part in General Grant's Vicksburg campaign, was at the battle of Champion Hills, Black River Bridge, the charges of the eighteenth and twenty-second of May, 1863, and at the siege of Vicksburg. He was most of the time in command of his regiment, as his colonel commanded a brigade. He was a gallant and able officer.

Soon after the siege of Vicksburg, he had typhoid fever of a very severe character, which left him in so weak physical condition that he was honorably discharged from the service. He came home and resumed the practice of the law.



In 1866 he was nominated without opposition and elected by a very large majority to be district judge of the Eighth judicial district. He was twice re-nominated and re-elected to the same position without opposition. Before his third term expired, he was appointed one of the supreme judges of the state and was three times nominated and elected by the people to be supreme judge. He was nominated by acclamation twice and would have been so nominated the third time only for the excitement on account of the supreme court having held the amendment to the constitution, known as the prohibition amendment, to be void for irregularities. As it was he was renominated by a large majority on the first ballot.

He voluntarily retired from the bench on January 1, 1897, having declined a renomination, and having served nine consecutive years as district judge and twenty-one years as supreme judge.

When it is remembered that Iowa was settled by the choicest young men and women from the eastern and middle states, this short story of his rise to one of the first places in the state testifies to his ability and worth.

I have known Judge Rothrock quite intimately during all his life in Iowa. His chief characteristics are probity, strong common sense and an unbiased judgment. The words "unbiased judgment" need definition. Men are much swayed by their passions and sentiments. When a man *feels* stronger than he *reasons*, his judgment is not safe. Judge Rothrock, as a judge, never *felt*,—he *reasoned*,—and his judgment was sound.

One of the panegyrists of Lord Mansfield said: "It is the business of a judge, not only to determine controversies betwixt man and man, but also to satisfy the beaten party that he got justice, to the end that he should have contentment and ease of mind." Judge Rothrock came nearer possessing this remarkable quality than any other judge I ever knew. In all the thirty years I practiced before him, I never knew him to show the least feeling. When zealous, and sometimes angry counsel *raved*, he *reasoned*. And thus it was, at the end, the defeated party generally felt that he had been justly beaten.

His written opinions, contained in sixty-one volumes of Iowa Reports, are models of compact statement, clear analysis, which march with irresistible force to an irresistible conclusion. There is a perspicuous method of stating the material, leading facts of a case that points to a just conclusion.

When you have read his *statement* of a case, you know how it is to be decided, and you do not have to look at the end for the words "Affirmed" or "Reversed." His language is plain, simple, terse, vigorous Saxon, without Latin quotations. If he wants to say anew he does not say *de novo*. He is not a great scholar, nor a man of any considerable literary attainments. He has devoted

his life to the elucidation of truth from varying human testimony, and to the faithful administration of justice.

His opinions and judgments show painstaking labor to master the facts, and a steady searchlight of judgment to discern the truth.

Iowa, for so young a state, has produced many eminent jurists, among them Justice Samuel F. Miller, Judges Dillon, Love, Cole, Wright and others, but for clearness of analysis, freedom from dicta, absence of feeling, and the presence always of strong, unbiased reasoning, the written judgments of Rothrock will stand, in the estimation of the future bar of this country, on an eminent equality with those of any American judge.

He has given to the state thirty years of devoted service such as few men have the robust physical and mental capacity to endure. He is still with us, but in somewhat broken health from his long successful labors.

In his prime he stood six feet, weighing 230 pounds, with a massive brain at the top. He is a good talker, a better listener, and withal of rare judicial bearing, indicating honesty, patience and all the attributes of a wise and just judge. The people of Iowa, without dissent, honor him as one of her first citizens and jurists.

Judge Hubbard, speaking further: I am sorry that Capt. Milo P. Smith, Judge Wm. G. Thompson, Judge Trimble and Smith McPherson are none of them present, but each of them has sent a tribute of Judge Rothrock, with the request that I present it to this court to be spread upon the record with the other tributes that shall be given. The only ones of the committee present are Mr. Carroll Wright and myself.

Here the speaker read remarks by Milo P. Smith, as follows:

MAY IT PLEASE THE COURT:

Judge Rothrock died in the full possession of all his mental powers in the seventieth year of his age, and preserved, up to a few months before his death, his usual robust health.

There was in his case no long and lingering decay, nor those evidences of mental weakness that are so distressing to friends and near relatives. I saw him on the eve of his last journey from home—when he knew the fell disease that carried him off had a sure hold upon him. I found his conversation just as bright and interesting as it ever was, and that he still enjoyed the recital of amusing incidents in his earlier life, while his laugh was as hearty as I had ever heard it.

Judge Rothrock passed the formative period of his life in that portion of the state of Ohio that has produced more eminent lawyers than any other given section of the Union. There was Ewing, and Thurman, and Stanton, and Groesbeck, and Mathews, and scores of others of whom I have heard him speak, who ranked among the best lawyers in America. The young man had seen, and knew many of them, and drew his first inspirations from the personalities of such men. And while he might not reach the same height as a lawyer, he could, and did make for himself a place as a jurist among the most eminent in the land.

The severe and laborious toils he underwent, when a boy, on his father's farm, in felling the heavy forest trees and clearing the land, undoubtedly developed that strong and active frame that enabled him to withstand the drafts he was constantly making upon it to supply the motive power for his strong and ponderous brain. He was always a thinker rather than a student of the law. He enjoyed the consideration and investigation of legal questions by thinking out how the law should be, rather than by seeking for authorities. His powers of discussion were somewhat limited, and consequently his judgment was the more unerring.

Many can be found who were more learned than he—and many whose breadth of reading far exceeded his—but I have known but few men who had a better understanding, a more comprehensive knowledge of common things, and a sounder judgment when once formed. He seemed peculiarly fitted for the station he so long held on the district and supreme benches. When the claims of two litigants were stated to him, he could, almost by intuition, tell who was in the right and who was in the wrong, and with marvelous accuracy point out the remedy to be applied. His judgment of facts was the best of any man I ever knew. Take him all in all, he was not only "a just and upright judge," but a conservative man of affairs, whose advice it was always safe to follow. While he was unswerving as a judge, he was as tender-hearted as a child, and always tempered his judgments with mercy. He was an excellent model in all the departments of life for the young and diffident to follow.

The habitually grave demeanor that so well became him on the bench, melted away when in the social circle, and his hearty "*bon homme*" was enjoyable to witness. And while he was a most genial companion, and loved to talk with his old friends,—whether high or low,—and enter into all the little details of life,—no one could treat him with rude familiarity. He was never a hail fellow well met, but was a man full of common humanity, and of strong social ties, regulated by the discretion of a calm, discerning mind.

The most marked feature in the make-up of Judge Rothrock was his wonderful amount of common sense. He rarely, if ever,

did an unwise thing, or said a foolish one. The even temper of his mind was a constant safeguard against errors of action or judgment.

His last illness and death were in keeping with his life—quiet and without ostentation. When his work was done he ceased to toil, and passed over to the other side.

Judge Wm. G. Thompson sends the following (reading):

MAY IT PLEASE THE COURT:

The resolutions just read, however expressive of the admirable traits of character possessed by Judge Rothrock in his life time, however full in expressions of friendship, love and confidence, yet when read with the memories of nearly forty years crowding upon me, words seem inadequate. In imagination, once more I see him in the early sixties. I met him for the first time, a young man in the prime of youthful manhood, just beginning his career, with only the gifts with which nature had endowed him and a manly self reliance, and an independent course of action by which his life work should be achieved and an honorable record made. And from that time until his death a close friendship, cemented by years of association in private and public life seem brief, conveying to the world but little of the grandeur of the mind and heart possessed by the deceased, and fail, as words must fail, to fully portray the excellencies of character and fidelity to right and justice so peculiarly his own. And standing as I now do by the newly made grave of Judge Rothrock, I once more recall the scenes of the past, and especially the true, unselfish friendship manifested towards me during his long and honorable public career. For many years it was my privilege to practice in his court when district judge, and for six years I traveled the district then composed of Jones, Cedar, Linn, Johnson, Iowa, Benton and Tama counties, a large district, he still as judge and I as district attorney. In these years I had abundant opportunities to study and know the man both as a judge and as a friend in social intercourse. During all these years he never once failed to open court on time. And being prompt himself he expected attorneys to be ready to proceed with the business on hand; yet amid all the irritating causes so often transpiring in court I never knew him to lose his temper or utter a harsh word, but he compelled attention and prompt work by gentle yet earnest demand on attorneys to avoid delay; and only for good cause was a case continued.

And while on the bench he was earnestly devoted to his duties, and gifted as he was with a rare, quick judgment of both law and facts in a case on trial, he was capable of dispatching business without permitting the time to be taken up with long arguments, which were avoided by a prompt decision of the point in dispute. But when relieved from his judicial duties he had supreme enjoyment in the social hour with friends and acquaintances. Genial and

open hearted, he was easily approached, and with a kind word for all who came into his presence, a stranger was at once made to feel that he was admitted as an equal. He never lost sight of the fact (and one that he was always proud of) that he was nurtured among the common people, and he never lost touch with them; and the people themselves soon learned the noble traits prominent in his character, loved and trusted him and felt assured that so long as their interests were intrusted to his hands that they would receive an honest, fair and upright hearing; and in this they were never disappointed. His conduct as a *nisi* judge had given to all confidence in his sound judgment, his honesty of purpose to do right by all, disregarding the clamor of prejudice and the insistence of the fanatical, discharging his duties as he deemed right, trusting to the sober afterthought to correct unjust criticism. And being so understood he was, by almost unanimous vote called to the high and responsible position of supreme judge, and later as chief justice of the state. How well he, in this capacity, discharged the important and onerous duties made incumbent upon him, let the volumes of Iowa reports given to the profession in the last twenty years speak. Through all these stand his many opinions, which will remain the best and most lasting monument to his honesty, integrity and uprightness as a jurist; and though he is dead, yet he speaketh to us, to all the profession, in all the courts of our land, and will guide the future courts in coming time, when we, like him, have passed over to join the great majority. And may they leave to those who follow a like honorable name and record.

As a patriot the history of our late struggle for the preservation of the Union will record the sacrifice he made, the opportunities he left, to offer his life in defense of the flag that protected him as well as every other loyal citizen,—will record for all time in more fitting language than I can.

As a father and husband he was a model. To home, wife, and children he was loving and loyal, and in his kind, manly heart they were enshrined and cherished, and in their midst he enjoyed more pleasure than he found elsewhere. He has left to his children a heritage of example to follow and emulate, more precious than gold can purchase.

This weak tribute I bring to the memory of one I loved and revered, and on his honored grave I would place a token of kind remembrance,—a noble patriot, an honest jurist, a kind parent, husband and friend.

Judge H. H. Trimble sends the following (reading):

IF THE COURT PLEASE:

I desire to say a good word for a good man. An eminent Irish orator and statesman once said: "A judge should be a thor-

ough mechanic," that is, he ought to be master of his profession. Judge Rothrock filled the full measure of this requirement. He was a lawyer. It was his sole life work. Early in life he learned that "The law is a jealous mistress," and he gave no ground for complaint. He spent but little of his time in the study of subjects that usually are attractive to the young lawyer,—oratory, statesmanship, philosophy, literature and politics,—but devoted his time to his chosen profession, and by patience, persistent and methodical work, made himself a very excellent lawyer. In his practice he early developed qualities that satisfied the people, as well as the bar, that he would make a good judge. He had "a sound mind and a sound body." He possessed a judicial temperament in a large measure. He was dispassionate, even tempered, patient, charitable and liberal minded in all the relations of life, having none of the dormant prejudices and passions that mar the judicial life of some of our brilliant jurists. He possessed excellent analytic powers, abundance of common sense, and an enlightened conscience. He was courteous and kind. Not the politic courtesy and sham kindness that carries a concealed stiletto, but a courtesy and kindness springing from large heartedness. He was possessed in an eminent degree of moral courage, that quality so often found weak in judges, and yet so essential to the judicial character. It rarely happens, in our liberal form of government and our high civilization, that the judge is called upon to render a judgment that involves his political or personal safety. The occasions that call forth the magnificent moral courage of Gascoigne, Coke and Holt, and aided in giving luster and a free constitution to the British nation, rarely arise in this free and enlightened country. Sometimes they do. Something like it arose when the supreme court of Iowa was called on to determine whether the first prohibitory act passed by the General Assembly of Iowa was constitutionally enacted and was a valid law. The members of that court understood perfectly the state of feelings that existed among certain people and political leaders, and realized that a decision holding it unconstitutional meant a sacrifice of the political standing of any judge who concurred in the decision. It is said of Lord Coke that on one occasion he shed tears over the prospect of losing a great office if he made a certain decision in a case then pending before him, but that he stood by his integrity, followed the dictates of his conscience, lost the office, but gained immortal fame. To the honor of the majority of the supreme court of Iowa, among whom was Judge Rothrock, it can be said that they exhibited the same high moral courage in the case referred to and showed that the spirit of moral heroism still survives in our Anglo Saxon blood, and affords a comfortable assurance that if the occasion shall in the future demand it, our judiciary will display that same courage that immortalized Gascoigne and Coke, and aided in giving liberty and a free constitution to the English people, and added luster to English history.

Judge Rothrock was a modest, unpretentious man, but a man of sterling qualities whose conduct as a practitioner won him hosts of friends, and whose conduct on the bench entitled him to the gratitude and love of the people of the state. All honor to his name!

Hon. Smith McPherson, who was a very warm and admiring friend of Judge Rothrock, as Judge Rothrock was of him, sends this brief note to Judge Deemer, which is as follows (reading):

**JUDGE DEEMER:**

Engagements which I can not honorably abandon will prevent me from being at the services in memory of Judge Rothrock. The fact that I never had a better friend makes my inability to be present of great regret.

I think he was a remarkable man. He was to me a lovable man and seemed to love all men who were at all worth loving. I do not recall that I ever heard him utter a word that could not have been spoken to a lady. I have seen him calm and serene, when his associates were, with much reason, exasperated. I recall an occasion when a prominent lawyer had filed a grossly insulting argument. The other four members of the court were in favor of vigorous discipline. Rothrock persuaded them to pass it by. He was exceedingly kind to the young lawyers, and kindly disposed even to the humblest of the profession who appeared in his court. And then he was strong. It is true his strength was rather rugged, as no one heard him talk of the books he had read. He quoted but little, and did not cite many cases. His opinions read as though taken by a stenographer when he was in conversation with a friend. He used no stilted language, and never affected study or learning. Marshall's best opinions were of the same kind.

Rothrock's career on the supreme bench covered periods when the public was excited and unbalanced. But he was never swayed. His reputation as a man is without stain, and as a judge, of the highest.

Mr. Carroll Wright then closed the memorial services, reading as follows:

**MAY IT PLEASE THE COURT:**

I cannot permit this occasion to pass without a word of tribute to the memory of Judge Rothrock. My feeling of grateful obligation to him as a man, my admiration for his great and good qualities of head and heart, will not allow me to remain silent in this chamber, where friends and colleagues have met to do honor to his memory.

I knew James H. Rothrock over a quarter of a century ago, when he was on the district bench and I a young student at the University of Iowa. He was a member of this court when I was admitted to its bar, and during all my professional life, up to three years ago, I had occasion to meet him at every term of this court.

I met him frequently at the home of my lamented father, and had occasion to greet him as a welcome guest in my own house. I learned to know the man, to realize his greatness, and regard him as a friend.

His opinions are to be found in sixty-eight volumes of the Iowa reports. They are conspicuous for their terseness and lucidity. When you have read his opinions you cannot fail to know the exact question decided. They are marvels of directness and perspicuity. He had a singular ability to grasp the questions involved, to reason out the proper conclusion, and to state that conclusion in simple, forcible Anglo-Saxon. He was a courageous man, in no sense a time-server. There was no hint of cowardice or timidity in his make-up. He was fearless in forming an opinion, equally fearless in his adhesion thereto, and no amount of popular clamor could change him. If he felt he was right, no personal relation or motive could alter his purpose, or control his public utterance. A man of unblemished integrity, the soul of frankness and candor, he scorned hypocrisy and unfair dealing. The little tricks of the law, and questionable practices, found no favor in his eye, and he was stern in their condemnation. His honest mind quickly pierced the shams that surrounded a case, and his trenchant pen unmasked them. During his judicial career he had for determination causes involving vast sums of money, causes intense in bitterness on either side, where success was sought at any hazard, and yet, during all that time, no suspicion of unfairness or favoritism cast a shadow on the armor of his magnificent character. Some might differ with him, but none ever questioned his absolute integrity and incorruptibility as a man and judge.

It is a source of great credit to Iowa, that so seldom has there been question of the integrity of its judiciary. Elsewhere, in sister commonwealths, suspicion, and more, have soiled the Ermine; but here we are proud to know that such doubts or questions have been infrequent, and it can be said of Judge Rothrock that he upheld at all times its unsullied purity.

James H. Rothrock laid broad and deep the foundation of his legal edifice. He was firmly grounded in the broad principles of the law. He knew its elements, its ramifications, its gradations. Without these, no man can become a successful lawyer or a great jurist.

He seemed intuitively, to recognize the changes that a new civilization demanded. He could apply the old principles to a changing, shifting, commercial world, as well as to the new quee-



tions that have arisen with the growth of cities, the march of invention, the changed methods of transportation, and the endless variety of franchises on every hand. It is one thing to master the old law; quite another to adapt it to such rapid changes as we have witnessed in the last quarter of a century.

It is well for the state that such a man should have helped to guide and mold its judicial law through such a period.

His life as a citizen of the nation was patriotic, true and courageous; as a citizen of the state he was ever alive to its demands, its needs and its advancement. He was a gentleman, a Christian and a noble type of pure, disinterested and devoted friendship.

When he laid life's burden down his children could call him blessed. A great state can honor his memory, conscious that he was a great, good, honest man; a broad, catholic, upright judge; a citizen without reproach; and his colleagues of the bench and bar now mourn a true and sincere friend.

As another has said, "Let us believe that in the silence of a receding world, he heard the great waves breaking on the farther shore, and felt already on his brow the breath of the eternal morning."

Judge Hubbard:

If the court please: I move that these tributes be spread upon the records of this court.

Mr. Remley:

If the court please: It is with pleasure I second most heartily the motion which has been made by Judge Hubbard, and I wish at this time to add my testimony to the worth of the life and the character of the late chief justice.

Chief Justice Robinson:

Are there any further remarks?

Hon. C. C. Cole:

MAY IT PLEASE THE COURT:

I had no knowledge of these contemplated proceedings until I saw notice thereof in the paper, near 9 o'clock this morning. I felt that I could not be true to myself, to my feelings towards Judge Rothrock and to his memory, without being present upon the occasion, although I had no thought of uttering a word.

My acquaintance with Judge Rothrock dates from his appearance in the legislature in this city, to which reference has been made, twenty-seven years ago, or approximately that. I knew him

but little until he was elected to the bench in the Eighth district. While he occupied that bench my duties in connection with the professorship of law in the State University called me to Iowa City, where I had frequent opportunities to converse with him. He was afterwards, with his wife, a visitor to the home of myself and family, and I have always had for him the most profound respect and affectionate regard.

Judge Rothrock was well learned in the elementary law. I do not know that I ought to say that he was a profound jurist, having fathomed the depths of its profundity in complicated questions, but I do know of his thorough knowledge of its principles, and can safely affirm that he had a judgment which was most searching and reliable. Not only was he honest and faithful in the discharge of his duties as judge, but he was favored beyond the average district judge in the state, in the marked ability of the lawyers of the different bars of the counties wherein he presided. The bars, I recall, of Johnson and Linn counties especially, were then pre-eminent in the state, and those of us who have had experience upon the bench, know how much, how very much, we are aided by a faithful, industrious and painstaking bar. This education of Judge Rothrock and his experience amid these aids, added strength and comprehensiveness to that judgment of his, so that it became cultured and strong beyond compare, and it may safely be said of him that no other man, upon this or any bench, every presented a more perfectly rounded and well poised character as a judge, whose judgments gave evidence, not necessarily of profound learning or high culture, but of intense practicality and wholesome justice.

To such a man this state owes a debt of gratitude which it cannot repay, and his name will stand high in the roll of those who have helped to lay wisely and well the foundations, and to build symmetrically the jurisprudence of one of the grandest states in the union. I could not do less than express these thoughts, and let it be known that I am not unmindful of his death and the loss it involves. While the state has lost a judge of great purity, strength and wisdom, I, together with many others, have lost a friend, ever faithful, manly and true.

Judge Hubbard:

If Your Honors Please: Judge Cole's remarks have been taken down by a shorthand reporter, and I add to my motion to spread his remarks upon the record with those that have been presented.

Chief Justice Robinson:

Is there any one else who wishes to make further remarks?

Mr. Jed Lake:

MAY IT PLEASE THE COURT:

I first met Judge Rothrock in January, 1862. He and I came to this city then, representing our respective counties in the house of the legislature. Our seats were near together. I very soon learned to regard his judgment and his integrity with a very high degree of appreciation. During the session of the legislature, the late Rush Clarke, of Iowa City, who had been elected speaker was taken sick and remained unable to attend the legislature from that time on to its close. With a very unanimous voice on the part of the republicans of the house Judge Rothrock was elected as the speaker *pro tem*, and occupied that position in his stead; and in that position showed qualities of mind in regard to fairness, uprightness and good judgment that have been spoken here so highly of him in the judiciary position that he afterwards occupied. During the time the legislature was in session, at its extra session that year, Judge Rothrock was appointed lieutenant colonel of the Twenty-fifth Iowa. I went out myself in the same position in the Twenty-seventh Iowa. I met him once or twice during the war. I found that in all his relations in the army he stood just as high and was regarded with just as much appreciation as he had been in the General Assembly.—considered a man of good judgment, a man of fair, good reasoning, a man who did not allow his prejudices to run away with his judgment, but always did that which he believed to be upright and proper to do. He did not, I think, allow his own personal wishes to waiver his judgment. When he had reasoned with himself and considered what was right to be done, that was the turning point with him; it was the controlling point with him. I met him a great many times while he was on the district bench. I did not live in his district, but I had some practice there. I found that there he stood just as high. And after he was transferred to this court it was the unanimous report of all whom I ever heard speak of him in court, or came in contact with him, that he was a man of great uprightness of character; of great good judgment, and as suggested, I think, stands very high in the estimation of all the people who have ever become acquainted with him, whether they were lawyers or laborers; those who had cases before him or those who had not,—a man of great social qualities. In his social relations outside he was a man that was very genial; a man that it was a pleasure to meet at all times, and I wish to say of him that I have always regarded,—did regard him all his life that I was acquainted with him,—as being a very upright, honorable, straight, honest man.

Chief Justice Robinson :

Are there any further remarks?

Hon. H. E. Deemer here read this response on the part of the court :

The court fully concurs in the temperate and truthful memorial resolution touching the life and character of a former member of this bench, and in the apt words with which it has been reinforced. It is a matter of gratification to all, and more particularly those of us who were intimately associated with the deceased, as we feel it must be to his family and more intimate friends, that these exercises have been conducted along the simple and dignified lines he would have prescribed could he have lifted the veil and given direction to those in charge. Fulsome praise and extravagant encomium have wisely given place to simple truth, and his eulogy, like his own utterances, has been characterized by moderation, just discrimination and careful abstention from irrelevant and overdrawn statement.

I did not know Judge Rothrock intimately until I took my seat with him upon this bench. From a mere speaking acquaintance, I had been lead to believe him a dignified, reserved, austere, unsocial being, who had little in common with the great mass of humanity. A few hours' work in the consultation room and a few evenings spent in social converse dispelled this illusion, and I soon discovered, as did all his friends who broke through this seeming reserve, the most charitable, companionable, social, and sympathetic of men.

Dignity and austerity of manner, and an apparent coldness of heart seem to be the inheritance of every man who devotes his life to judicial labor. But to meet in full measure the requirements of the position one must be endowed with all the human emotions and appreciate to their full extent all the well springs of human activity. All who associated with Judge Rothrock in the common and daily affairs of life, all who became intimately acquainted with him know that he was a man of tender heart, of warm sympathy, of great kindness, of unswerving fidelity, and of intense loyalty.

Unassuming, simple in his tastes, regular and temperate in his habits, dignified in demeanor, charitable in his conclusions and considerate to a degree he was a most delightful companion and loveable man.

He was a man who commanded respect rather than one who stimulated enthusiasm, and in consequence chose judicial position in preference to a strictly political or professional life.

He was not an orator, and he had little patience with men who came to this bar to tickle the fancy of the court with high sounding

phrase or gorgeous rhetoric. He believed that arguments should be addressed to the understanding, not to the imagination, of the hearer. Well phrased sentences, rythmical rhetoric, and stentorian appeals were alike impotent unless based upon established facts and reinforced by invincible logic. No student of human nature could mistake his preference for the Doric, rather than the Ionic or Composite.

He was not, as has been said, what would now be called a scholarly man. No collegiate degree was ever conferred upon him. But he had what is, and always has been better, a natural genius for the law and a marked judicial cast of mind. Qualifications for great success at the bar may have been wanting, but fortunately for the people of the state, they soon learned his capacity and capabilities for work on the bench, and in this relation he served them for more than twenty-five years. Others have spoken of his services to the state in civil and military life before being called to the supreme bench, and it remains for me to add a few words regarding his work here.

The ancients deified their great men by driving the stars into constellations that their memories might be ever before them. Later pyramids and temples were built to perpetuate the memories of the dead,—monuments and commemorative tablets are now erected for this purpose, but the greatest monument to any judge is the one builded by his own hand and published in the official records of his court. The monument to our deceased brother will be found in his published opinions, commencing in 42 Iowa, at page 399, and ending with 100 Iowa, at page 432. During the time covered by these reports our court did more work in any given year than at any other time in its history, and the opinions then filed are the live opinions of today. Others had cleared the foundations, but he was called upon to strengthen the pillars and adorn the entablatures, and now, as we are endeavoring to raise the dome still higher in the sky, we must rely upon the superstructure for its support. Important as was the work of preparing for and laying the foundations, the detailed labor upon the superstructure required as much, if not more acumen.

The striking peculiarities of Judge Rothrock's opinions are clearness of statement and directness of argument. All extraneous and collateral matters are brushed aside as by a master hand, and the controlling point in the case is alone considered and decided. A long opinion emanating from his hand is rarely found. He always insisted that the value of an opinion was not to be measured by its length, and that, as a rule, the shortest opinions are the best.

Rarely did he go to authorities outside those cited in the briefs, and he was not given to citing many cases. A sort of intu-

itional divination as to the law and the very right of the case seemed to be his guide. Latin quotations were generally eschewed, and he made no pretense to a learning that he did not possess. This was typical of the man. He never wore a mask and he thoroughly despised deception. Patient industry and careful examination into the facts was his rule, and having discovered the facts the very right of the controversy was the end he sought. If there was no precedent for such a state of facts he easily and quickly made one. If there were cases in our own court which seemed decisive they were to be followed as a rule whether right or wrong for he was a firm believer in the maxim of *stare decisis*. If the decision claimed to control was of another jurisdiction, and he believed the application of it would amount to a denial of justice he could generally find some way to distinguish, for he believed in the old motto that courts should be astute and subtle to discover a way to effectuate justice. At times he boldly asserted that some of the old and well settled rules of the common law were not suited to our present conditions and circumstances, and it was with difficulty that he was persuaded that any rule no matter how ancient ought to be adopted which would be the means of doing an injustice.

He was bold and fearless and having satisfied himself as to the proper disposition of the case nothing could cause him to recede. Private interest, public clamor and specious argument were alike impotent to influence or swerve him from a position once deliberately chosen.

Although not a great talker he gave close attention to all that was said by his associates at the consultation table, and when fully convinced he voiced his opinion in a few short, terse and conclusive sentences which always carried great weight. His reasons were always logical and his judgments clear; and the decisions he voiced are safe and valuable as precedents and as expositions of the law.


If I were asked for his strongest points I would say they consisted in the excellence of his judgment and his immense store of good common sense. These qualifications led to clearness and conciseness of expression; and bench and bar have rarely if ever been embarrassed by looseness or redundancy in his manner of writing opinions. If they do not smell of the classics they are not darkened by uncertainty or obscurity.

This monument to the learning, ability, sound judgment, and knowledge of affairs which Judge Rothrock wrote for himself is as enduring as our civilization. It cannot be extenuated by friend or maligned by foe. As said by another, "Justice is the great interest of man on earth. It is the ligament which holds civilized beings and civilized nations together. Wherever her temple stands, and so long as it is duly honored there is a foundation for social security, general happiness and the improvement and progress of our race. And

whoever labors on the edifice with usefulness and distinction connects himself in name and fame and character with that which is and must be as durable as the frame of human society."

Chief Justice Robinson:

The resolutions and remarks to which we have listened will be spread upon the records of the court, and as a further mark of respect to Judge Rothrock court will stand adjourned until 9 o'clock tomorrow.



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REPORTS  
OF  
CASES AT LAW AND IN EQUITY  
DETERMINED BY THE  
SUPREME COURT  
OF  
THE STATE OF IOWA  
AT

DES MOINES, JANUARY TERM, A. D. 1899,

AND IN THE FIFTY-THIRD YEAR OF THE STATE.

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.133	23

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CONRAD MAY, Plaintiff and Appellee, v. LOUSA MAY, Defendant, Appellant

**Divorce:** CONNIVANCE IN ADULTERY. Adultery of a wife, committed  
1 with a spy employed by the husband to test the wife's virtue,  
does not entitle him to a divorce.

**CONDONATION.** A husband's acts of cruelty, for which the wife is  
2 largely to blame, are condoned by her failing to make complaint,  
apologizing for her own conduct, and continuing to live with  
him, where no future danger to her life or health are to be  
apprehended.

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\*The figures on the left of the syllabi refer to corresponding figures placed on the margin of the case at the place where the point of the syllabus is decided.

*Appeal from Dubuque District Court*—HON. FRED O'DONNELL, Judge.

THURSDAY, APRIL 6, 1899.

SUIT in equity for a divorce. The defendant also brought a like suit against the plaintiff, and the two actions were consolidated; defendant's petition being treated as a cross bill. The trial court denied the relief asked by each, and both parties appeal. As defendant first perfected her appeal, she will be called the "appellant."—*Affirmed*.

*Longueville, McCarthy & Kenline* for appellant.

*Lyon & Lyon, John B. Utt* and *Matthews & Barnes* for appellee.

DEEMER, J.—I. Plaintiff and defendant were married at Jamestown, Wis., on or about November 23, 1877, and lived together as husband and wife until February 19, 1897. Five children were born to them. For many years there have been frequent quarrels between them, which finally culminated in what we will denominate the "McGregor incident," which will be hereinafter referred to. Plaintiff has been almost insanely jealous of his wife; and, to say the least, her conduct has not at all times been discreet. We are satisfied, too, that plaintiff has at times shamefully abused the defendant; but many of their quarrels were provoked by the wife. It is charged in the petition that defendant has been guilty of adultery with at least four different persons. Defendant denies that she was guilty of adultery with any of them, and alleges as grounds for divorce from plaintiff that he has been guilty of such cruel and inhuman treatment as to endanger her life. There is evidence in the record tending to show unlawful and illicit relations between defendant and three different men. As to one, it produces no more than a suspicion of improper conduct, but as to the

other two it is direct. Notwithstanding its directness, we are satisfied that there is no truth whatever in the claim that she had intercourse with one of these two men. It appears, without dispute, however, that in the month of February, 1897, defendant left her home in Dubuque without notifying any of her family that she was going; went to the town of McGregor, part of the way in company with a man by the name of Blanchard, who assumed the name of Brown; and then went to an hotel, where Blanchard registered the two as E. H. Brown and wife, from Chicago, who were assigned to a single room. Blanchard introduced defendant as Mrs. Brown, and was in her room, in conversation with her, during the evening. Early the next morning, plaintiff appeared upon the scene, was shown to the room where defendant was staying, and there a controversy arose between them as to what had occurred between her and Brown during the night. There is a dispute as to the length of time Brown was in the room, and as to what occurred there, and the witnesses do not agree as to what was said when plaintiff appeared. There is also some little dispute as to what defendant's purpose was in leaving home. We are satisfied, however, that she thought she was going to Elkader, and that she did not know she had to stay over night in McGregor.

On the one hand, it is contended that defendant committed adultery with Blanchard, alias Brown, in the hotel, on the night in question; while on the other it is stoutly contended that, while the defendant may have been indiscreet, yet she did not have any illicit relations with Blanchard, and that whatever was done was with the husband's connivance and consent. We do not find it necessary to determine which is right in this contention, although we may say that defendant's conduct was, to say the least, very injudicious. But, if it be conceded that the act of adultery was in fact committed, plaintiff is in no position to take advantage of it. The evidence very clearly establishes the fact that plaintiff induced Blanchard to go to his

home, to act as a spy, to see if he could not discover the wife in the act of adultery. He lived there in that relation for some time before he induced the defendant to go to McGregor, and she went on the false pretense that she was to go to Elkader to visit friends. Not only was Blanchard invited into plaintiff's home for the purpose of procuring evidence against his wife, but we are also satisfied that he was employed by plaintiff for the purpose of having intercourse with the defendant, if he found it possible to do so. If, then, Blanchard did have intercourse with defendant, it was with plaintiff's consent, and through his connivance, and he cannot be heard to complain. *Cane v. Cane*, 39 N. J. Eq. 148. "That to which a party consents is not esteemed, in law, an injury," is an old maxim, which is especially applicable to such a case as this. From the fact that the husband appeared upon the scene at the time he did, it is quite evident that he knew of the whole plan, and, in effect, consented to it. A court of equity will not grant relief under such circumstances. *Pierce v. Pierce*, 3 Pick. 299; *Hedden v. Hedden*, 21 N. J. Eq. 61; *Myers v. Myers*, 41 Barb. 114. Plaintiff has no right to complain of his wife's conduct at McGregor. The other acts of adultery alleged by plaintiff are not sustained by sufficient evidence to justify a decree in his favor, and the trial court was right in dismissing his petition.

II. The evidence introduced by defendant shows that plaintiff has been guilty of various acts of cruelty, which would ordinarily entitle her to a divorce. But here it appears that she was in many, if not in most instances, to blame. Barring certain conduct of plaintiff, which occurred so long ago that the presumption of condonation obtains, it appears that defendant persisted in keeping company with a certain man against the plaintiff's protests. Whenever he discovered that she had been in this man's company (and we may remark parenthetically that we find no evidence of anything more than the slightest improprieties

between them), a controversy arose, which always resulted in hard words between them, and sometimes blows. Defendant was to blame for not observing her husband's admonitions about not talking to, or being in company with, this man; and generally she took her own part in the quarrels which resulted after she had disobeyed these instructions. In other words, she at times provoked the plaintiff into making his assaults, and at others made an assault upon plaintiff herself. But, aside from all this, she continued to live and cohabit with her husband down to within a few days of the McGregor incident. She made no complaint of his conduct, but apologized for her own, and seemed content to live with him to the very last. Her conduct clearly amounts to a condonation of her husband's offenses, serious as some of them may have been. *Gardner v. Gardner*, 2 Gray, 434; *Phillips v. Phillips*, 27 Wis. 252; *Douglass v. Douglass*, 81 Iowa, 258. It goes without saying that if we were satisfied that plaintiff's acts of cruelty would be repeated, and that there is danger to defendant's life or health, should she continue to live with the plaintiff, we would be slow to find that condonation should avail the plaintiff in defending against his wife's petition. This does not appear, however. Indeed, there is little, if any, evidence that defendant's life or health were ever endangered. She seemed to be content to live with her husband during all the years he was practicing his cruelty, and we do not think had a thought of bringing a divorce suit until plaintiff began his action. Under such a state of affairs, we may well doubt defendant's sincerity in bringing her suit. We are not to be understood as holding that defendant was guilty of adultery at the town of McGregor, or that plaintiff's conduct towards his wife is to be approved. We simply find that neither party is in position to obtain a decree of divorce. The case is peculiar in many of its aspects, and is an extremely unfortunate one for both of the parties. They have children, who they are each anxious should procure a good education—two of them being in the



high school in the city of Dubuque—they have ample means to provide for the necessities, and most of the luxuries of life; and there is every reason why they should live together harmoniously as husband and wife. Plaintiff, as we have said, is extremely jealous, and defendant may not have been entirely discreet in her conduct; but due consideration by each of the feelings and conduct of the other ought to remedy all evils, bring these parties together, and effectuate a reconciliation which will be lasting. The decree of the district court is, on both appeals, **AFFIRMED**.

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**ESTHER H. PARSONS V. GRAND LODGE OF ANCIENT ORDER OF UNITED WORKMEN OF IOWA, Appellant.**

**Divorce and Marriage: PRESUMPTIONS.** On the issue whether a claimant under a policy is legally a beneficiary of a life policy as  
 2 the legal wife of the insured, it will be presumed that he obtained  
 4 a divorce from a first wife before he married claimant. (In this case the evidence showed divorce as much as first and second marriage.—REPORTER.)

**Pleading: ADMISSIONS.** Matter in reply, by way of confession and  
 1 avoidance, does not dispense with proof of allegations of the  
 3 answer which stand denied by operation of law. Whether such proof would be made by using the reply in evidence, is left undecided.

**Proof of Loss: Waiver.** The attorney for the beneficiary under a  
 5 policy in a mutual benefit association wrote to the insurer, informing it of the death of the insured, and asking what was needed by way of proofs. The insurer replied that the insured had been suspended for nonpayment of dues, and that, if the attorney “understood the laws of Iowa governing this class of insurance, you [he] would undoubtedly hesitate to have taken any action in the case without further evidence.” Held a waiver of proofs of death, but one not available because not pleaded.

**PLEA AND PROOF.** McClain’s Code 1888, section 1734, providing that  
 6 the assured shall give the company or association notice in writing of the loss, accompanied by an affidavit stating the facts as to how the loss occurred, applies to mutual benefit associations; and hence; where the giving of due notice is pleaded, and denied by the answer, plaintiff must prove, not only the giving of notice but also the making of the affidavit.

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119	520
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108	6
136	317

*Appeal from Blackhawk District Court.*—HON. A. S. BLAIR,  
Judge.

THURSDAY, APRIL 6, 1899.

ACTION at law on a certificate of membership in the defendant company. Defendant admitted the issuance of the certificate, and that plaintiff is the beneficiary named therein, but denied all other allegations of the petition. It further pleaded that plaintiff was not the legal wife of the assured, and that the insured falsely and fraudulently represented that she was his wife, whereas in truth he had another wife living, from whom he had not been divorced. Plaintiff replied that she was married to the assured in April of the year 1893, and that she had no knowledge that he was then married to another. She further pleaded that some months after her marriage she learned that Frank H. Parsons, the assured, had another wife living, but that she had been divorced some two years prior to Parsons' death. She further pleaded that when she became beneficiary in the policy she was the *bona fide* wife of Parsons, and was a legal member of his family. Some other matters, in addition to a general denial, were pleaded, which need not be more particularly noticed. The trial court directed a verdict for plaintiff, and defendant appeals.—*Reversed.*

*J. D. & C. Nichols* for appellant.

*Mullan & Picket* and *D. E. & G. T. Lyon* for appellee.

DEEMER, J.—I. On the fifteenth day of October, 1892, the defendant, a mutual benefit association, issued a certificate of membership to Frank H. Parsons, in which Ada H. Parsons, who then bore the relationship to him of wife, was named as beneficiary. Thereafter, and on the thirteenth day of December, 1893, the assured directed and requested the defendant to change the beneficiary, and in this direction

said: "And now authorize and direct such payment to be made to Mrs. Esther H. Parsons, bearing relation to myself of wife." Thereupon, and on the twenty-eighth day of the last-mentioned month, the company issued a new certificate to Parsons, in which the beneficiary was named as "Esther H. Parsons, his wife." At the time these certificates were issued, the law (Acts Twenty-first General Assembly, chapter 65, section 7) provided that no certificate should be issued to any person unless the beneficiary thereunder should be the husband, wife, relative, legal representative, heir, or legatee of the insured. The constitution of the association also provided that no certificate should be issued or made payable to any person not a member of the family or heir of the assured, and that, when a change of beneficiary was desired, the beneficiary under the new certificate must be a legal member of the family, or an heir at law of the member. Defendant contends that the evidence tended to show that the marriage between the assured and Esther H. Parsons was null and void because of prior marriage of the assured.

1 As the allegations of the answer pleading prior marriage were denied by operation of law, the burden was on defendant to show that plaintiff was not the wife of the assured. The confession and avoidance contained in the reply did not obviate the necessity of such proof. Code, section 3577; *Day v. Insurance Co.* 75 Iowa, 694; *Nichols v. Railroad Co.* 94 Iowa, 202; *Schulte v. Coulthurst*, 94

Iowa, 418. To prove the prior marriage, defendant  
2 introduced the direction first made by the assured to pay the amount to which he might be entitled to Ada H. Parsons, whom he described as his wife; a letter of the assured, in which he said there had been a mistake in his original certificate, and that it should read payable to Esther H., instead of Ada H.; letters in which he stated that Esther H. Parsons was his lawful wife, and that Mrs. Esther H. Parsons had only been his wife since December 2, 1893; and a statement made by him to an agent of the association, some

time before the second certificate was issued, to the effect that he had procured a divorce from Ada Parsons in Chicago. The only other evidence bearing on the question is that of plaintiff, in which she says she was not related to the assured in any other way than wife. We have already seen  
3 that the admissions in the reply cannot be considered.

Whether or not they might have had probative force had they been introduced in evidence, we have no occasion to determine. Conceding, then, for the purpose of this case, that statements, oral and written, made by the assured prior to the time of the issuance of the certificate in question, are admissible in evidence, and that proof of a void marriage would defeat plaintiff's right of recovery, we find that the same kind of evidence adduced to sustain these propositions establishes the fact that the assured was divorced from his first wife prior to the time he received the second certificate of membership, and that he was married to plaintiff some  
4 time in December of the year 1893. The law also raises a presumption in favor of innocence, and that there was no legal impediment to the contracting of the second marriage. *Blanchard v. Lambert*, 43 Iowa, 228, and cases cited; *Leach v. Hall*, 95 Iowa, 611. The case is not like one in which the former wife is making a claim to her husband's property, as were *Gilman v. Sheets*, 78 Iowa, 499; *Ellis v. Ellis*, 58 Iowa, 720; and *Barnes v. Barnes*, 90 Iowa, 282. The trial court was right in holding that the invalidity of the second marriage was not established.

II. The petition alleges that due notice of death of the deceased was presented to the proper officers of the defendant. This is denied in the answer. To sustain the allegation, the plaintiff introduced a letter written by her attorney to the grand recorder of the defendant at Waterloo, Iowa, in which  
5 the association was informed of Parsons death, and asked what was needed by way of proofs. To this the recorder responded by saying that Parsons had been suspended for nonpayment of dues and other delin-

quencies, and further stating that, if the attorney "understood the laws of Iowa governing this class of insurance, you (he) would undoubtedly hesitate to have taken any action in the case without further evidence." Undoubtedly, this amounted to a waiver of proofs of death. *Grattan v. Insurance Co.*, 80 N. Y. 281; *Shaw v. Insurance Co.*, 69 N. Y. 286; *Bloom v. Insurance Co.* 94 Iowa, 359; *George Dee & Sons Co. v. Key City Fire Ins. Co.*, 104 Iowa, 167, and 6 cases cited. But, as a waiver was not pleaded, it cannot be relied upon. *McCoy v. Insurance Co.*, 107 Iowa, 80; *Heusinkveld v. Insurance Co.*, 96 Iowa, 224; *Heusinkveld v. Insurance Co.* 95 Iowa, 504; *Eiseman v. Insurance Co.*, 74 Iowa, 11; *Zinck v. Insurance Co.*, 60 Iowa, 266; *Welsh v. Insurance Co.*, 71 Iowa, 337. The 7 statute (McClain's Code 1888, section 1734) provides that the assured shall give the "company or association notice in writing of such loss, accompanied by an affidavit stating the facts as to how the loss occurred, so far as they were within his knowledge." This section applies to mutual benefit associations as well as to fire and life insurance companies. *Cook v. Association*, 74 Iowa, 746; *Christie v. Investment Co.* 82 Iowa, 360. And the statutory notice includes an affidavit showing the facts regarding the death. *Von Genechtin v. Insurance Co.* 75 Iowa, 546; *Wilhelmi v. Insurance Co.* 86 Iowa, 326. So that an allegation that due notice was given necessarily implies that proofs of death were furnished. And, in face of a denial, proof of the giving of the statutory notice is required. As there was no such evidence, the court erred in directing a verdict for plaintiff. The case of *Welsh v. Insurance Co.*, *supra*, is quite in point on this last proposition. For the error pointed out, the judgment of the district court is REVERSED.

STATE OF IOWA V. J. H. BUSSAMUS, *Appellant.*

**Mule Law:** "SINGLE ROOM." A room fronting on a street, with a door opening out on it, and another door leading to another room, in which are stored the liquors sold in the former, is not "a  
 2 single room having but one entrance," within Code section 2448, Subdivision 4, permitting the sale of intoxicating liquors in such room under certain conditions.

**Liquor Selling: JURY QUESTION.** Where accused admits a sale of pepsin bitters after notice not to sell intoxicants to the person in question, and a witness testifies that pepsin bitters is intoxicating,  
 1 the question is for the jury whether the sale is within Code, section 2448, subdivision 11, prohibiting the selling of intoxicants to any person whose relatives have by written notice forbidden such a sale.

**Jurors: KNOWLEDGE OF DISQUALIFICATIONS.** The fact that a juror was a member of the jury on a former trial of the case is no  
 8 ground for a new trial, though counsel for accused were unaware of that fact, where it does not appear that accused himself had no knowledge thereof.

*Appeal from Sioux District Court.*—HON. GEORGE W. WAKEFIELD, Judge.

THURSDAY, APRIL 6, 1899.

THE defendant appeals from a judgment convicting him of maintaining a nuisance.—*Affirmed.*

LADD, J.—I. During the trial it was stipulated that all the conditions of section 2448 of the Code had been complied with, except those hereinafter mentioned. The wife and son of one Hastings notified the defendant not to furnish him intoxicating liquors. As the defendant admitted receiving this notice, the point made against oral proof of its contents requires no attention. Thereafter he sold Hastings Pepsin Bitters. As one witness testified this  
 1 drink was intoxicating, there was a conflict in the evidence as to whether the defendant had violated the

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108	11
111	358
111	660
108	11
113	24
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120	157
108	11
127	246
108	11
144	388

eleventh subdivision of the section mentioned. The evidence also tended to show that written consent of the freeholders owning property within fifty feet of his place of business had not been filed prior to the finding of the indictment, and thereby subdivision 2 of the section was disregarded. But the defendant testified on the trial that he had not complied with subdivision 4, which is, in part, as follows: "Said selling or keeping for sale of intoxicating liquors shall be carried on in a single room having but one entrance or exit, and that opening upon a public business street." This language is too explicit to require construction. By a single room having one entrance or exit is meant one room, with one door only which may be used, and that on a public business street. This excludes an entrance or exit from or into any other room. Had the legislature intended the use of a room, large or small, in which to store liquors, or for any other purpose, in connection with and opening into the single room, this would have been mentioned, rather than guarded against. A door opened from the room in which defendant operated his saloon into another room or shed, where he stored, and from which he procured, his liquors. This was in violation of the requirement quoted. The jury, then, could properly have returned no other verdict than that of guilty.

II. There was a mistrial at a previous term of court. A member of the jury sat as juror at that trial. This fact was not known to counsel, but whether known to the defendant does not appear. To take advantage of the disqualification of a juror, after verdict, it is incumbent on the party complaining to show affirmatively that neither he nor his counsel had knowledge thereof before the juror was sworn. *McKinney v. Simpson*, 51 Iowa, 662; *Rollins v. Ames*, 2 N. H. 349 (9 Am. Dec. 79); *State v. Tuller*, 34 Conn. 280; *Morrison v. McKinnon*, 12 Fla. 552; *Anderson v. State*, 14 Ga. 709; *Kent v. City of Charlestown*, 2 Gray, 281; *Eastman v. Wight*, 4 Ohio St. 156; *Achey v.*

*State*, 64 Ind. 56; *State v. Labaure*, 46 La. Ann. 548 (15 South Rep. 172); *Townsend v. Briggs*, 99 Cal. 481 (32 Pac. Rep. 307, 34 Pac. Rep. 116); 12 Enc. Pl. & Prac. 475; 1 Thompson Trials, section 116. This is for the reason that if known to the party, or his attorney who acts for him, the omission to challenge waives all objections. *State v. Pickett*, 103 Iowa, 714.—AFFIRMED.

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STATE OF IOWA V. J. C. MOATS, Appellant.

**False Pretenses: JURY QUESTION.** Prosecutor an eccentric and weak minded man, testified that accused and another induced him to sign a deed of his farm by representing it to be an application for insurance and that he received no money therefor. The person who, with the accused, had procured the deed testified that the transaction was a sale of the farm, and that the prosecutor received a second mortgage on it, and a certain sum in cash, the  
1 proceeds of a loan made on the farm for the buyer, less the amount of the prior mortgage thereon which was paid off, a receipt for the money alleged to have been paid the prosecutor was produced, but he testified that accused had induced him to sign a white paper, and that he did not sign the receipt. The mortgage back to the prosecutor was not recorded and delivered until accused was suspected of the fraud, and, when the deed was signed by prosecutor, accused and the other person went there, ready to close the bargain, and with the papers prepared for signature. Accused retained all the papers and the other person negotiated the loan on the farm before its purchase. Held that a conviction for obtaining the deed by false pretenses was warranted.

**EVIDENCE: Rebuttal.** The defense to a prosecution for obtaining a deed by false pretenses was that the transaction was a sale of the lands, part of the consideration being the payment of money to prosecutor; and in corroboration thereof a receipt signed by prosecutor was produced. Prosecutor testified that he did not sign the receipt but signed a blank paper; and there was evidence  
4 that the receipt was written by accused. An accomplice testified for accused that he went to prosecutor's place alone and procured the receipt. Hel , evidence that, on the day when the receipt was produced, accused was seen near prosecutor's house, was admissible in rebuttal of the accomplice's testimony, and to corroborate the evidence that the receipt was written by accused.

**MENTAL CAPACITY OF PROSECUTOR.** In a prosecution for obtaining a deed by false pretenses, evidence of prosecutor's mental con-



dition subsequent to signing it, and that his condition was the  
5 same prior thereto, and continued unchanged up to the time of  
the trial, was admissible, where prosecutor was a witness, to aid  
the jury in understanding his strength of mind when the deed  
was signed, and determining his credibility.

*Objections.* Evidence received without objection in a criminal case  
3 need not be stricken.

**Disqualification of Juror: KNOWLEDGE.** That a juror was biased on  
5 his *voir dire* and concealed that fact, is no ground for a new trial,  
unless it appears that his bias was unknown to accused.

*Appeal from Wright District Court.*—HON. B. P. BIRDSALL,  
Judge.

THURSDAY, APRIL 6, 1899.

THE defendant appeals from a judgment convicting him  
of the crime of cheating by false pretenses.—*Affirmed.*

*Ladd & Rogers* for appellant.

*Milton Remley*, Attorney General, and *W. H. Redmond*  
for the State.

LADD, J.—I. The particular offense charged is that  
the defendant and one J. A. Lyons induced Ole Shelstrand  
to sign a deed conveying his eighty-acre farm to Anna C.  
Lyons, on the representation that the instrument was an  
application for insurance on his house. Before this, Lyons  
had arranged with Tracy for a loan of one thousand two  
hundred dollars, and soon thereafter obtained it by executing  
a mortgage on the land. Out of this a prior mortgage of  
five hundred and fifty dollars and taxes were paid.  
1 Lyons testified that he gave Shelstrand the balance,  
and took his receipt; that he bought the land for two  
thousand three hundred dollars, and the deed, and the two  
notes for one thousand one hundred and fifty dollars, and a  
mortgage on the land to Shelstrand, securing the remainder  
of the purchase price, were drawn and signed at the latter's  
house; that Moats was to be paid one hundred dollars out of  
certain accounts for finding a buyer, and to hold the papers

until the loan was negotiated. On the other hand, Shelstrand testified that, when at his home, Moats, who came with Lyons, requested him to sign an insurance paper, afterwards to be filled out, which he did; that he did not sell the land or sign a deed; that he never received any money from Lyons or Moats; and that, though he wrote his name on a piece of white paper at another time, when both were at his place, he did not sign the receipt. The evidence shows that Shelstrand lived alone, was very eccentric, not of strong mind, with little or no furniture in his house, in the habit of going to his work backward or sidewise, of standing or sitting in one position an unusually long time, and possessed of other peculiarities, but that he understood business fairly well, could work, was not of defective memory; and he does not appear to have been unreliable. No objection was made to his competency, and the record discloses no sufficient reason for doing so. He is somewhat corroborated by the undisputed facts of the transaction, tending strongly to show that advantage was taken of his weakness, rather than that he, through weakness, fabricated the story. True, evidence of some of his statements tends to his discredit. Only the controverted inquiry concerning the loan is inconsistent with his testimony, as the other statements may have been made after he had learned of the existence of a deed, and the conclusion might well be reached that it in fact was never made. That the defendant and Lyons attempted to take an unconscionable advantage of him is not doubted; and in view of the circumstances that they went out to buy the farm, carrying with them the deed, and everything ready to close the bargain, that Moats retained all the papers, that Lyons negotiated the loan before the purchase, that the mortgage back to Shelstrand was not recorded or delivered to him until the defendant was suspected of the fraud, and that Lyons, a stranger from Carroll county, paid out nothing on the land, we think the jury may well have accepted the testimony of Shelstrand, and found the defendant guilty as charged.

II. The trial court did not abuse its discretion in denying the application for a change of venue. The transaction occurred in one corner of the county, and the affidavits satisfactorily show that the prejudice, if any existed, was confined to that part. It does not appear to have been general, or such as to have precluded a fair and impartial trial. *State v. Foster*, 91 Iowa, 168; *State v. Read*, 49 Iowa, 85; *State v. Perigo*, 70 Iowa, 657.

III. The motion to strike out the evidence of certain witnesses, to the effect that Moats was seen near Shelstrand's house on the eleventh of August, with Lyons, was rightly overruled. No objection had been made to its introduction, and, the ruling might well rest on the ground that a party may not permit evidence to be received without objection, and thereafter, in the absence of any showing, have it stricken from the record. *State v. Marshall*, 105 Iowa, 44. But it tended to rebut the testimony of Lyons that he drove to the house alone in Moat's surrey on that day, and procured the receipt, and to support the evidence tending to show the receipt was written by Moats. Exception was also taken to evidence concerning Shelstrand's mental condition subsequent to the transaction. But the witnesses had stated that they had known him prior thereto, and such condition had continued unchanged up to the time of the trial. As he was a witness, this was calculated to aid the jury in better understanding his strength of mind at the time the deed was signed, and in determining what credit to give to his story. It was admissible.

IV. It is urged as a ground for a new trial that one of the jurors was biased, and entertained an unqualified opinion of defendant's guilt, which he concealed on the *voir dire* examination. It does not appear, however, that this, if true, was unknown to the defendant's attorneys, and for this reason we cannot inquire into the merits of the claim. *State v. Bassamus*, 108 Iowa, 10. —*Affirmed*.

NANCY A. TELLER *et al.* v. THE EQUITABLE MUTUAL LIFE  
ASSOCIATION OF WATERLOO, IOWA, Appellant.

**Venue:** INSURANCE COMPANIES. Under Code 1873, section 2584, providing that insurance companies may be sued in any county in which their principal place of business is kept or in which the contract of insurance is made, a company is not entitled to have a  
2 cause commenced in the county in which the contract was made, transferred to the county in which the principal place of business is kept. If the statute could be construed to say that the place of making the contract governs only where the contract is made in the county wherein is defendant's principal office, it could happen that suit might not be properly brought in the county where the principal office is located.

**Jurisdiction:** SPECIAL APPEARANCE. Under Code 1873, section 2626 providing that a special appearance to object to the service of  
1 notice shall render further notice unnecessary, such appearance gives jurisdiction, regardless of the notice or service.

**Appeal:** REVIEW. Where the evidence is stricken and an equity  
3 cause presented on assignment of errors, refusal to suppress a deposition, nor refusal to grant a new trial for newly discovered  
4 evidence can be reviewed, the court not being able to assume that the new evidence was not cumulative, and where, to a defense that proof of death was not furnished in time, extension and waiver  
5 are pleaded, error in permitting recovery against the provisions of the policy cannot be reviewed as a matter of law, the evidence being stricken out.

*Appeal from Keokuk Superior Court.*—HON. R. H. BELL,  
Judge.

THURSDAY, APRIL 6, 1899.

RALPH R. TELLER became a member of the defendant association in July, 1883, and his certificate entitled him to insurance in the sum of two thousand five hundred dollars; the certificate, by its terms, expiring on the twelfth day of July, 1893. This action is brought, alleging that Ralph R. Teller died in January or February, 1893, and that the fact

of such death was not known till May, 1894; and a recovery is sought under the terms of the certificate. The answer makes admissions and denials, and sets out that the certificate of membership provides for proofs of death to be made within one year after death occurred, and denies the fact of the death of Teller, or that proofs of loss or death were made as required. Some other facts will appear in the opinion. The district court gave judgment for the plaintiff, and the defendant appealed.—*Affirmed.*

*A. J. McCrary and John E. Craig for appellant.*

*James C. Davis and A. Hollingsworth for appellee.*

GRANGER, J.—I. This is an equity cause, but the evidence was stricken from the record on motion, so that the matters for our consideration arise on assignments of error. The principal place of business of the defendant corporation is at Waterloo, in Blackhawk county, in this state.

1 The action was brought in Lee county, and service was made on one J. K. Mason, as agent for the defendant. There was a motion by appellant to dismiss the action for want of jurisdiction, because of no service on defendant; it being claimed that Mason was not an agent on whom service could be made. Affidavits were used on the hearing of the motion, and the motion was denied. The ruling is assigned as error. The appearance, though special, makes it unnecessary to consider the motion on its merits. Section 2626 of the Code of 1873, which was in force when the service was made, provides what the mode of appearance may be; and, among others, there is a provision for a special appearance for any purpose connected with the service or insufficiency of the notice. In connection with that provision is this language: "And an appearance, special or other, to object to the substance or service of the notice, shall render any further notice unnecessary; but may entitle the defendant to a continuance, if it shall appear to the court, that he has not had the full and

timely notice required of the substantial cause of action stated in the petition." We can add nothing to the conclusiveness of the statutory language. The appearance gave jurisdiction, regardless of the notice or service.

II. In the same motion it is asked, in case the motion to dismiss should be overruled, that the cause be transferred to Blackhawk county for trial on the ground that it was brought in the wrong county. This motion was over-  
2 ruled, and error assigned. The court did not err.

The law then in force provided that "insurance companies may be sued in any county in which was made the contract of insurance." Code 1873, section 2584. The contract of insurance in this case was made in Lee county. The insurance was solicited, the terms agreed upon, and the policy delivered in that county. If it should be said that the meaning of section 2584 is not that such a suit may be brought in any county where the contract is made, and that the words, "in which was made the contract of insurance," have reference only to when such suit may be brought in the county in which is kept the principal place of business, then it is to be said that an insurance company could not be sued in the county where its principal place of business is, unless the contract was made there; and in this case the suit could not have been brought in Blackhawk county, for, as we find, the contract of insurance was not made there, but was made in Lee county. The section, entire, reads as follows: "Insurance companies may be sued in any county in which is kept their principal place of business, in which was made the contract of insurance, or in which the loss insured against occurred." When the section is read in connection with section 2586, which is the general one fixing the place for bringing suits where not otherwise provided, there is hardly room to doubt our conclusion. There was no error in the ruling.

III. There is complaint of the action of the court in refusing to suppress certain depositions. It is only necessary

to say that the depositions are not before us, for the reason  
that a motion to "strike from the record all the evi-  
3       dence in the case" was sustained. A consideration of  
the grounds presented by the motion to suppress would  
require an examination of the depositions.

IV. It is urged that it was error to permit a recovery  
against the provisions of the certificate that proof of death  
should be made within one year from the occurrence of death.  
The assured lived in Lee county, and left his home there and  
went to Florida in 1892; and later a body was found in a lake  
or pond which is claimed to be his, and the district  
4       court has so found. This body was found in 1894,  
and long after the year had expired for giving the  
notice under the terms of the certificate. To meet defend-  
ant's defense on this branch of the case, plaintiff, in reply,  
sets out some correspondence, and pleads an extension of time  
to make proof by agreement, and also a waiver. Under such  
a state of the record, we cannot determine the question as one  
of law. What the evidence disclosed we cannot and do not  
know.

There is further claim of error for refusing a new trial  
because of newly discovered evidence. Nor can we consider  
this question. A new trial is not allowed for newly discov-  
ered evidence that is cumulative. We cannot assume  
5       that it is not. Errors must affirmatively appear, to  
warrant a reversal. We cannot know that the court  
did not refuse the new trial because the new evidence was  
cumulative.—AFFIRMED.

#### LIZZIE BAILEY V. CITY OF CENTERVILLE, Appellant.

**Damages: DUTY TO MITIGATE.** A physician, who in an action for  
injury to plaintiff's leg, had testified that the adhesion was not  
to the bone, but to the fasciae; that it did not interfere with the  
range, but with the freedom of motion; that the wound might be  
painful, with changes of the weather, and would be so under any

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111 580  
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- 5 condition of weather if the nerves were caught up in the scar,—should be allowed to testify whether a slight surgical operation, involving but little inconvenience to the patient, would break adhesion, and restore the leg to its normal use, so that there would be no retarding of motion, or special inconvenience from the scar, as if such was the case, it was plaintiff's duty to alleviate her injury, and she could not recover for consequences which might thus be avoided.

INSTRUCTIONS. An instruction, in an action for personal injury, that the jury should determine to what extent plaintiff had been disabled, and whether such disability will "*probably*" continue, and allow her for such disability such sum as the evidence shows her entitled to, is not erroneous as allowing recovery for dis-

10 ability other than what the evidence showed was reasonably certain to continue, especially where in the same instruction, the jury were told that plaintiff could only recover such damages as were caused solely by the accident, in determining whether there would be future damages.

PLEADING. A prayer for judgment for a certain amount because of permanent injury to plaintiff's leg is sufficient, it the absence of

9 a motion for more specific statement, to allow a recovery for loss of earning capacity resulting therefrom.

**Married Woman: SEPARATE EMPLOYMENT.** Evidence that the plaintiff, a married woman, owned a sewing machine, and took in sewing regularly, and made thereby five to ten dollars a month is evidence

8 of a separate employment sufficient to allow her, in an action for personal injury, to recover for loss of earning capacity.

**Evidence: SIDEWALKS.** Evidence in an action against the city for injury from a defective sidewalk, that there was no change in the

1 condition of the walk for a month after the accident, is admissible; there being other evidence as to the condition just after the accident.

**SAME.** Admission of evidence as to the condition of a sidewalk two hundred feet from the place of the accident is not error; there

3 being evidence that the walk for the distance of the entire block within which the accident occurred was out of repair, and in a dangerous condition.

**CONCLUSION.** Testimony that from the time witness noticed the sidewalk till plaintiff was injured thereby, a period of six months, "it

2 did not get in any better shape," is not a mere conclusion but an affirmation that there was no change in its condition.

**SAME.** Testimony in an action for personal injury, that plaintiff

4 "looked bad," that apparently she could scarcely walk, and that she lifted her foot very tenderly, is admissible.

**INSTRUCTIONS: Sidewalk.** Where the evidence is that the sidewalk was continuously in bad condition for the entire block within



which the accident happened, an instruction that the evidence to  
6 show that boards were loose in other places in the same block was  
to be considered only on the question of notice does not direct  
separate and distinct defects to be considered.

SAME. An instruction that the evidence tending to show that the  
sidewalk was out of repair a short distance from the accident was  
to be considered only 'for the purpose of tending to show, if it  
does (and that is for you to say), whether or not' the city should,  
6 by the exercise of reasonable care, have had notice of the con-  
dition of the walk where the accident happened, does not assume  
a state of facts to exist, but leaves it to the jury to say whether  
the evidence tended to show that the city had notice of the defect  
causing the accident.

*Harmless Error.* An instruction telling the jury not to consider the  
7 amount of sidewalk the city had to maintain is not prejudicial  
though there is no evidence regarding the matter.

*Appeal from Appanoose District Court.*—HON. F. W. EICH-  
ELBERGER, Judge.

FRIDAY, APRIL 7, 1899.

ACTION at law to recover damages for personal injuries  
sustained by plaintiff, due to a fall on one of the sidewalks  
in the defendant city, which it is claimed was out of repair,  
and in an unsafe and dangerous condition. The case was  
tried to a jury, resulting in a verdict and judgment for plain-  
tiff, and defendant appeals.—*Reversed.*

*Mabry & Payne* for appellant.

*C. F. Howell* for appellee.

DEEMER, J.—While walking along one of the streets of  
defendant city, accompanied by her husband, plaintiff struck  
one of her limbs against a loose board in one of the sidewalks,  
which was raised from its place by reason of her husband's  
stepping upon the inner end thereof. The injury received  
resulted in necrosis of the left tibia, necessitating a surgical  
operation, that was performed by surgeons of plaintiff's  
choice, but which plaintiff claims, left her seriously and per-

manently disabled. The alleged negligence is failure of the city to keep its sidewalks in good condition for public travel.

A witness was asked as to any changes in the condition of the walk after plaintiff received her injuries, and he answered that there was no change for a month or so  
1 after the accident occurred. This evidence was properly admitted, for another witness was permitted to testify as to the condition he found it in just after the accident. *Munger v. City of Waterloo*, 83 Iowa, 559.

Another witness was allowed to testify, over defendant's objection, that from the time he first noticed the walk until plaintiff was injured, a period of six months, "it did  
2 not get in any better shape." This was merely an affirmation that there was no change in its condition, and was not a mere conclusion, but a fact which might properly be given in evidence.

Evidence as to the condition of the walk some two hundred feet from the place of the accident was also admitted over defendant's objections. In view of the other evidence tending to show that the walk in front of the  
3 entire block adjoining the sidewalk was out of repair, and in a dangerous condition, there was no error. *Munger v. City of Waterloo*, *supra*; *McConnell v. City of Osage*, 80 Iowa, 293.

A witness was permitted to state that the plaintiff "looked bad," that apparently she could scarcely walk, and that she lifted her foot very tenderly. Such evidence  
4 was properly admitted. Rogers Expert Evidence (2d ed.), section 4, and cases cited; *Yahn v. City of Ottumwa*, 60 Iowa, 429; *State v. Shelton*, 64 Iowa, 333; and *State v. Huxford*, 47 Iowa, 16.

A physician called by the defendant was asked, on re-direct examination, if a slight surgical operation, involving but slight inconvenience to the patient, would break up the adhesion found in plaintiff's leg, and restore it to its normal use, so that there would be no

retarding of motion, or special inconvenience from the scar. An objection to the question was sustained, and error is assigned on the ruling. This witness had  
5 already stated that the adhesion was not to the bone, but to what is called the "fasciae," and said that it did not interfere with the range, but did with the freedom, of motion; that the wound might be painful, with changes of the weather, and would be so under any condition of weather if the nerves were caught up in the scar. The question to which we have referred was then propounded to him. We think it should have been answered. Answer to the interrogatory would, no doubt, have thrown much light on the question as to the extent of plaintiff's injury. Again, if, by slight expense and by slight inconvenience, plaintiff might have avoided the consequences of the defendant's negligence, it was her duty to go to this expense and suffer this inconvenience. Of course, she would not be required to undergo a serious or speculative surgical operation. But if a slight operation, involving but slight inconvenience, would relieve the plaintiff, it was her duty to alleviate her injury. And, if she failed and neglected to do so, she cannot recover from consequences which might thus be avoided.

Other assignments of error relating to rulings on evidence are without merit, or the errors, if any, were subsequently cured.

II. A portion of instruction No. 6 reads as follows:  
"(6) The court has permitted evidence to go to you tending to show that the walk within a short distance from the place where it is claimed the accident happened was out of repair; that is, that boards were loose at other places in the  
6 same block. You are especially instructed that this testimony should be considered by you, as against the city, only for the purpose of tending to show, if it does (and that is for you to say), whether or not the city authorities should have had knowledge or notice of the condition of the walk or plank where the accident is claimed to have happened,

by the exercise of reasonable care." This is complained of,—*First*, because it directs that separate and distinct defects in the walk might be considered by the jury in determining the question of notice; and, *second*, because it assumes a state of facts as true, and usurps the province of the jury. Taken in connection with the evidence adduced, we do not think it is vulnerable to the first objection. This evidence tended to show that the walk was continuously in bad condition in front of the whole block. The latter objection is not tenable. The court did permit evidence to go to the jury tending to show that the walk was out of repair a short distance from the place of accident, and the instruction leaves it to the jury to say whether or not such evidence tended to show that the city had notice or knowledge of the defect which caused the injury. In other words, the effect of such evidence was left to the jury. In this respect the case differs from *State v. Porter*, 74 Iowa, 623, relied upon by appellant. That such an instruction was proper, see authorities heretofore cited in the first division of this opinion, and *Armstrong v. Town of Ackley*, 71 Iowa, 76.

III. The jury were told not to take into consideration the amount of sidewalk which the city had to maintain, nor its financial condition. It is said there was no evidence relating to these matters, and that the direction was erroneous.

7 True, there was no evidence regarding these matters.

But the instruction was clearly without prejudice. If they did not consider such matters, it is the same as if no evidence had been adduced upon the subject; and, as defendant asked nothing on account thereof, no harm resulted.

IV. The latter part of the tenth instruction is as follows: "If she has been prevented by said accident from performing labor on her sewing machine, you should inquire and determine from evidence to what extent she has been disabled, if any, and whether or not, under the evidence, such disability will probably continue, and allow her for such disability such sum as the evidence shows she may be entitled to. But

the entire sum should not exceed the amount claimed in the petition." This is challenged because it is said that  
8 there is no evidence that plaintiff, who is a married woman, was engaged in a separate employment. The evidence tended to show that plaintiff owned a sewing machine, and that she took in sewing regularly, and made at least five, and sometimes ten dollars, per month; that she had such separate employment as entitled her to recovery for loss of earning capacity, and that the evidence was sufficient, see *Mewhirter v. Hatten*, 42 Iowa, 291; *Tuttle v. Railroad Co.*, 42 Iowa, 518; *Fleming v. Town of Shenandoah*, 67 Iowa, 508; and *Meier v. Shrunk*, 79 Iowa, 22. Again,  
9 it is said the petition does not ask damages for loss of earning capacity. The prayer is for judgment for five thousand dollars because of the permanent injury to plaintiff's limb. While it is not as specific as it might have been, yet it was sufficient in the absence of a motion for more specific statement, and entitled plaintiff to prove such damages as necessarily resulted from the wrong complained of. In other words, the damages were not special, but general, and no special plea was necessary. Moreover, evidence of loss of capacity to earn was admitted without objection, and the matter was treated as a proper element of damage. In view of this record, defendant has no cause for complaint. See *Collins v. Collins*, 46 Iowa, 60. And, as sustaining our conclusions generally on this proposition, see *Dickens v. City of Des Moines*, 74 Iowa, 216, and *Flannigan v. Railroad Co.*, 83 Iowa, 639. Further, it is stoutly insisted that the  
10 use of the word "probably" in the instruction was erroneous. In the case of *Ford v. City of Des Moines*, 106 Iowa, 94, we held that the use of the word "may," as applied to future pain, inconvenience, and impairment of earning capacity, was erroneous, and said: "In other words, the jury was authorized to allow the plaintiff for pain, inconvenience, and impairment of enjoyment which the evidence showed might continue in the future, which was merely pos-

sible, not for what the evidence showed was reasonably certain to continue. In this respect the charge was erroneous." In *Miller v. Boone County*, 95 Iowa, 5, we approved a charge directing the jury to allow such damages as may reasonably be expected to arise in the future from the injuries received. In *State v. Jones*, 64 Iowa, 349, the word "probable" received judicial construction, and it is there said: "If it was made probable to the jury that the defendant was so far insane as not to be accountable for his acts, we think that he should have been acquitted. Worcester defines 'probable' as 'having more evidence for than the contrary.' Webster defines it as 'having more evidence for than against.' We think that it was sufficient if the evidence of insanity preponderated. The idea of the court seems to have been that, as the presumption of insanity counts for something, it cannot be said to be overcome by a bare preponderance of evidence. There is a course of reasoning which might, perhaps, seem to support this view. The difference between a bare preponderance of evidence and that which is next less might be said to be infinitely small, and that what is infinitely small cannot be weighed or appreciated. But such considerations are too refined." Applying that rule to the case at bar, and to the evidence adduced upon the trial, which was to the effect that the injury was permanent, we think there was no error. While one court has disapproved of the use of the term "reasonable probability" in an instruction relating to future pain and suffering (*Block v. Railway Co.*, 89 Wis. 371 (61 N. W. Rep. 1101), and *Smith v. Traders' Exchange*, 91 Wis. 360 (64 N. W. Rep. 1041), yet this same court has also held that an instruction to the effect that plaintiff might recover for pain which she may have to endure in the future, but that, in order to assess damages for the future, the jury must be satisfied to a reasonable extent, from the evidence, that she will continue to suffer, was good. *Kliegel v. Aitken*, 94 Wis. 432 (69 N. W. Rep. 67). Other courts have approved of the use of the word "likely" (*Railroad Co. v. Davidson*, 22 C. C. A. 306

(76 Fed. Rep. 517); *Scott Tp. v. Montgomery*, 95 Pa. St. 444; and others, the words "reasonably certain" (*Stafford v. City of Oskaloosa*, 64 Iowa, 251; *Ross v. Kansas City*, 48 Mo. App. 440; *Sherwood v. Railway Co.*, 82 Mich. 374 (46 N. W. Rep. 773); and still others "reasonably result" (*Chilton v. City St. Joseph*, 143 Mo. Sup. 192 (44 S. W. Rep. 766)). Reasonable certainty that future pain and suffering or loss of capacity will follow is all that is required. When we say that it is "likely" or "probable" that such results will follow, we mean the evidence preponderates that way, and there is that reasonable certainty which the law requires. Something more than mere conjecture is necessarily implied. Moreover, in the same instruction, the court plainly instructed that plaintiff could only recover such damages as were caused solely by the accident, and that the jury must be guided by the evidence in determining whether or not there would be future damage. While it would have been better to use the words "reasonably certain," yet, looking to the whole instruction, we think that idea was conveyed, and that there was no prejudicial error. For the error pointed out in the first division of this opinion, the judgment is REVERSED.

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W. B. COLLINS, Appellant, v. CITY OF KEOKUK *et al.*

**Certiorari:** BY TAX PAYER: *Review of ordinances.* A petition to review by certiorari the validity of a city ordinance, by one alleging that he is a citizen and tax payer will not lie where it does not show that he had any right which was affected by the ordinance not common to all resident tax payers and water consumers.

*Appeal from Lee District Court.*—HON. H. BANK, JR.,  
Judge.

FRIDAY, APRIL 7, 1899.

THIS is a proceeding by *certiorari*. A demurrer to the petition was sustained, and, the plaintiff failing to plead

further, judgment was rendered against him for costs, and he appeals.—*Affirmed.*

*W. B. Collins* for appellant.

*Hazen I. Sawyer* and *James C. Davis* for appellees.

ROBINSON, C. J.—The petition alleges that the plaintiff is a resident and taxpayer of the city of Keokuk, and a consumer of water; that in June 1877, the council of the defendant city of Keokuk passed an ordinance which authorized the defendant, the Keokuk Waterworks Company, to establish and maintain waterworks within the city for the period of twenty years; that the company constructed and established such works and maintained them, and supplied the city and its citizens with water, until the ninth day of October, 1896, when the council passed another ordinance, which took effect on the first day of January, 1897, and gave to the company the right to lay and maintain its water pipes and mains within the city for the period of ten years from the time the ordinance took effect, for the purpose of securing water for public and private purposes for the city. The petition avers that the ordinance is void, because it was not submitted to a vote of the electors, and approved by a majority of them, at a general or special election, and for the further reason that the rates which it authorized are unreasonable. Portions of it are also alleged to be void on other grounds. We do not find that the petition asks any relief, but, since no objection on that ground is urged, we will consider some of the questions discussed in argument.

I. One ground of the demurrer is that the petition does not show that the plaintiff has an interest in the matter in controversy which entitled him to maintain this action. It is not shown that the plaintiff has any interest in matters affected by the ordinance not common to all persons who are taxpayers and residents of the city of Keokuk and consumers of water. It is not shown that the effect of the ordinance



will be prejudicial to the interests of the city, and the plaintiff does not, therefore, show that his interests as a taxpayer may be affected. Nor does it appear that the plaintiff, and all other persons who may possibly be threatened with injury from certain provisions of the ordinance which are alleged to be illegal, on special grounds, would not have an ample remedy in the ordinary course of law. Section 3216 of the Code of 1873, under which this proceeding was commenced, authorized the writ of *certiorari* only in the cases where there was no other plain, speedy, and adequate remedy. The petitioner in the case of *Iske v. City of Newton*, 54 Iowa, 586, sought to test the validity of an ordinance which prohibited the keeping of wine or beer for sale, but this court held, in effect, that the fact that he was a citizen and taxpayer of the city did not alone entitle him to maintain a proceeding by *certiorari*, and that, as he did not show that he had any right which the ordinance affected, the writ should have been denied. The rule thus announced is applicable in this case, and finds support in the following cases: *Welch v. Board*, 23 Iowa, 203; *McHenry v. Sneer*, 56 Iowa, 649; *Smith v. Yoram*, 37 Iowa, 89; *News Co. v. Harris*, 62 Iowa, 501. It is clear, under the statutes and authorities cited, that the plaintiff has not shown himself entitled to the writ.

The conclusion reached makes it unnecessary to determine whether the approval of a majority of the electors of the city, expressed at a general or special election, was essential to the validity of the ordinance, or whether, if the plaintiff is aggrieved by the ordinance, proceeding by *certiorari* is his proper remedy. It is also unnecessary to decide other questions discussed by counsel. The judgment of the district court appears to be right and it is AFFIRMED.

HENRY HARTRICK *et al.* v. THE TOWN OF FARMINGTON,  
Appellant.

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**Temporary Sidewalks:** GRADE. Code of 1878, section 466, provides that the town council shall have power to construct sidewalks; and section 468 authorizes them to lay temporary sidewalks on the natural surface of the ground on a street not permanently improved. *He'd*, that, where no permanent grade is established, the council cannot construct a temporary plank sidewalk above the natural surface, so as to bring it on a line with improvements on the street.

*Appeal from Van Buren District Court.*—HON. T. M. FEE,  
Judge.

FRIDAY, APRIL 7, 1899.

THE defendant is an incorporated town. The plaintiffs, Henry Hartrick and Emma Fitchenmueller, are owners of property abutting on State street, in said town. The street has no established grade, and is not, legally speaking, permanently improved. The two plaintiffs are owners of adjoining lots on said street, the course of the street being east and west. West of the lots owned by Fitchenmueller is Miller's block, and east of Hartrick is the lot owned by Thero, and east of that what is shown on the plat as Sterling Mills. These properties embrace all abutting property on the north side of State street, between Second and Third streets; the Miller block being on Second street, and Sterling Mills on Third street. The Thero and Sterling Mills lots have been improved, and in front of the buildings thereon is a sidewalk about three feet above the natural surface of the ground on that side of the street; and a grade or direct line from the surface of this sidewalk, at the west side of the Thero lot, to the Miller block, running past the lots belonging to the plaintiffs, would be about three feet above the natural surface at

the east end, and about one foot at the west end. The town council has constructed a walk from the Thero lot west, in front of the lots belonging to plaintiffs, on the line we have described, and giving it that elevation above the natural surface. This action was brought to enjoin the defendant from erecting or maintaining such a walk, and upon the trial below there was a decree for plaintiffs, and a mandatory injunction awarded commanded the defendant to remove the walk so erected. The defendant appealed.—*Affirmed.*

*Mitchell & Sloan* for appellant.

*Wherry & Walker* for appellees.

GRANGER, J.—Appellant, in argument, regards the case on appeal as involving three legal propositions, the first being as follows: "Has a town council the power to cause the erection of a plank sidewalk, elevated some two or three feet above the natural surface, so as to bring it on a level along its length, and on a street on which no permanent grade is established? That is, until a permanent grade is established for the street, must the sidewalks be built down on the natural surface, without regard to the condition or evenness thereof? This question, to adapt it to the case, should be slightly modified, by taking from it the reference to an uneven natural surface; for there is nothing in this case to show that the elevation of the walk above its natural surface was because of its unevenness, or for any reason except to bring the walk in a line with the recent improvement of the Thero lot and the walk in front of it and the Sterling Mills lot; so as to make an even walk between Second and Third streets. The case is controlled by the law as it stood prior to the present Code, and we quote from the Code of 1873, as to the authority of a town council as follows:

"Sec. 466. They shall have power to construct sidewalks, to curb, pave, gravel, macadamize, and gutter any highway or alley therein, and to levy a special tax on the lots and parcels

of land fronting on such highway or alley to pay the expenses of such improvement."

"Sec. 468. They shall have the power to provide for the laying of temporary plank sidewalks upon the natural surface of the ground, without regard to grade, on streets not permanently improved, at a cost not exceeding 40 cents a lineal foot, and to provide for the assessment of the cost thereof on the property in front of which the same shall be laid."

The walk in question was a temporary one of plank, on a street not permanently improved, and hence section 468 defines the authority of the council. It is probably true that it should be read in connection with section 466, which deals with the general subject; but there can be no doubt that section 468, as a grant of power, embraces all there is as to the laying of temporary walks on streets not permanently improved. The grant of such power in section 468 clearly shows that it was not the legislative purpose to grant the same in section 466. Devesting the case of any question as to the authority of the council to depart from the natural surface of the ground in such cases, because of difficulties arising from abrupt depressions or elevations of the surface, and looking alone to the authority of the council to go above or below the natural surface to conform the grade of the walk to other improvements made, so as to meet public or private convenience, we have the real question for our consideration. Thus stripped of matters that tend only to confuse the case, the difficulties are at an end, for the language of the statute is both plain and conclusive. The statute is not a limitation on previous authority, so that what is not prohibited exists; but it is a gift or grant of authority, so that what is not granted does not exist. It is a perversion of the language of the section to say that its purpose is merely to limit the liability of the abutting property owners to 40 cents per lineal foot, leaving the excess of cost to be paid from a general fund, or from some other source. If the grant of

power for such purposes was included in the language of section 466, as appellant seems to think it is, why repeat the grant of power in section 468; when in section 466 a few words would have fixed the limitation as to cost to abutting property owners in such cases? The two sections seem to be specific grants of power. The conclusion is aided by reason, and this case illustrates it. There is no established grade of the street with reference to which improvements can be made. Grades are established that all may conform thereto, and not be subjected to the inconveniences of being undesirably above or below walks made at grade. It is well understood that streets in our municipalities will sooner or later be permanently improved upon established grades, and improvements prior to the establishment of grades are not called permanent; they are deemed temporary; and, during that period the use of abutting lots on streets can best be by treating the natural surface as the grade, so that these temporary walks may not be above one man's door and below another, and to the exact convenience of another. The case of *Railway Co. v. Spearman*, 12 Iowa, 112, is not authority for appellant's position in any sense. The decree of the district court set aside all proceedings of the town council establishing the walk in question, including ordinances for that purpose, and ordered a mandatory injunction against maintaining the walk, and its decree is right. The holding dispenses with a necessity for considering other questions. The judgment is AFFIRMED.

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IN THE MATTER OF THE ESTATE OF WENZEL LONGER,  
Deceased.

**Will:** WHAT IS. An instrument executed and witnessed as provided for in a case of a will, and intended as such by deceased, is such though reciting, "I agree to will."

*Appeal from Washington District Court.*—HON. D. RYAN,  
Judge.

FRIDAY, APRIL 7, 1899.

THIS is a proceeding to secure the probate of an instrument purporting to be the will of Wenzel Longer, deceased. The probate was contested and refused, and from such judgment the proponents appeal.—*Reversed.*

*C. J. Wilson* and *H. M. Eicher* for appellants.

No appearance for appellee.

WATERMAN, J.—The instrument offered for probate was as follows:

"February 17, 1897. I agree to will to Rosie Hinek four hundred and fifty dollars \$450.00. Jim Longer a house and lot in Riverside. Any Marek two hundred and fifty dollars \$250.00. Barbara Fouchek three hundred dollars \$300.00. Mary Hotz five dollars \$5.00. Jose Hinek one hundred and fifty dollars \$150.00. Fannie Parizk five hundred dollars \$500.00. And what remains to Jim Longer's children. The funeral expensis is to be paid by Jim Longer.

"Witnesses

Vaclav Longer.

"Justice of the Peace

"Ed. Stackman.

"Jozef Rabas."

Among other objections urged by the contestants, it was said that the instrument is not in fact a will. In addition to the testimony relating to its execution, the court received evidence as to the intent and purpose of Longer in executing it, and made the following finding: "(3) At the time of the signing, subscribing, and execution of said instrument as aforesaid, said Vaclav Longer was of sound and disposing mind; and said instrument was voluntarily executed by him, with knowledge of its provisions, without any undue influence or fraud exerted upon him in the execution of the same. (4) The parol evidence introduced shows that at the time of the signing and execution of said instrument, Exhibit A, the said Vaclav Longer thought he was thereby executing his last will and testament, and intended the said instrument, Exhibit A, at the time of its execution, to be and constitute his last will

and testament. (5) At the time and place of the execution of said instrument, the said Vaclav Longer requested the witnesses thereto, to-wit, Ed. Stackman and Jozef Rabas, to subscribe their names to said instrument as witnesses to his will; and in obedience to said request, properly and correctly communicated, the said witnesses did at said time and place properly subscribe their names to said instrument, and witnessed the same, as the last will and testament of the said Vaclav Longer. (6) The said instrument, Exhibit A, was in every manner and form executed and witnessed in full and complete compliance with the provisions for the execution, signing, and witnessing of wills in the state of Iowa, except as hereinafter stated: Said Vaclav Longer died on or about the 28th day of February, 1898, near Lone Tree, in Johnson county, Iowa, and said instrument, Exhibit A, was executed at the same place. (7) At the time of the death of said Vaclav Longer, he was upwards of sixty years old; and he was the owner of a house and lot, located in Riverside, in Washington county, Iowa, and about two thousand dollars (\$2,000) in personal property. (8) Said Vaclav Longer, deceased, made no effort to execute a will, except the execution of Exhibit A, offered in evidence in the trial of this cause; and said Vaclav Longer and James Longer are one and the same person. (9) The court further finds that the said instrument, Exhibit A, is not sufficient in its terms to constitute a will or testament, in that the same has no expression or terms of bequest or devise to any parties therein named, or any other person. Therefore the finding of the court herein is against the proponents, and the said instrument, Exhibit A, is refused admission to probate as the last will and testament of Vaclav Longer, deceased, and hereby declared, from its terms, to constitute no will. D. Ryan, Judge."

We cannot agree with the conclusion of law announced by the trial court. No particular form is required for a will. Much latitude is allowed in the construction of such instruments. *Wescott v. Binford*, 104 Iowa, 645, 651, 652. The

main object of the courts is to learn the intention of the maker. The intention being known, all inartificiality of language or looseness of expression must yield to, and be governed by it. Different papers may be construed together, as constituting a will. An instrument in the form of a deed, but executed with the formalities of a will, and by its terms to take effect after death, has been held a will. *In re Lautenschlager's Estate*, 80 Mich. 285 (45 N. W. Rep. 147). See, also, Schouler Wills, section 265. Furthermore, we may say that, in the absence of all extrinsic evidence as to the intention of Longer, we think the trial court allowed undue force and weight to the word "agree," as used in this instrument. If this was an agreement only, it was unilateral, and there is no pretense of consideration. To consider the instrument as a naked promise to make a will is to let go for naught all the formalities of its execution. Looking to the writing alone, and it appears that the words "I agree to will" mean nothing else than "I do will." The words "I agree to sell," in a contract, have been held to import a present sale. *Ives v. Hazard*, 4 R. I. 16. See, also, *Martin v. Adams*, 104 Mass. 262; *Baldwin v. Humphrey*, 44 N. Y. 609. But, aside from these considerations, the finding of the court that this instrument was intended to create a testamentary gift is controlling. Schouler Wills, section 272. To ascertain this intent, when the terms of the writing are not clear, collateral evidence may be received, as was done in this case. Schouler Wills, section 273. When the *animus testandi* is established, the character of the instrument is fixed. It is a will.

What construction should be given certain provisions of this instrument, in view of the court's finding that Jim Longer named in the will, is identical with the testator, is a matter upon which we are not called on to express an opinion. An instrument may be entitled to probate, though some of its terms are meaningless.—REVERSED.



108	88
108	136

108	38
1132	630

WILLIAM F. MURPHY v. D. H. MCCARTHY, Administrator,  
Appellant.

**Claims Against Decedent: PAYMENT: Burden of proof.** The provision of Code, section 8340, that the burden of proving that a claim is unpaid shall not be placed on the party filing a claim against the estate, applies to a claim for board of decedent, so that it is necessary to prove only the contract therefor to establish a *prima facie* case, but where the purpose of plaintiff in an action against testatrix's estate, on a claim, in introducing her will made just before her death is not apparent, except that plaintiff's counsel in argument refers to a direction therein that all just debts of testatrix be paid, the declaration therein "I owe no debts to anyone," is sufficient to require plaintiff to prove that his claim was not paid.

**Testimony: OBJECTIONS.** Motion to strike out answer of witnesses to a question as to what the board furnished by plaintiff would be worth a week, made on the ground that she had not shown herself competent to testify, is properly overruled, as the objection should have been made before the answer, the incompetency being as apparent then as after the answer.

**SAME.** Answer of witness as to what it was worth to keep decedent, "I would not keep her for less than five dollars a week," is subject to motion to strike out as unresponsive.

**RULING.** Objection to evidence will be regarded as waived, in the absence of ruling thereon.

*Appeal from Dubuque District Court.*—HON. J. L. HUSTED,  
Judge.

FRIDAY, APRIL 7, 1899.

PROCEEDING in probate for the allowance of a claim against the estate of decedent. There was a trial by the court without a jury, and an order allowing the claim. The defendant appeals.—*Reversed.*

*Longueville, McCarthy & Kenline* for appellant.

*Lyon & Lyon* for appellee.

ROBINSON, C. J.—The plaintiff seeks to recover of the estate of Margaret Powers, deceased, the sum of four hundred

and eighty four dollars for board and washing furnished the decedent during a period of one hundred and twenty-one weeks, and the claim was allowed to the amount of four hundred and eighty dollars.

I. Mrs. Newman testified as a witness, and was asked, in regard to what the decedent was furnished by the plaintiff, "what it would be worth a week," and answered: "About \$4.50, and very reasonable at that." The defendant moved that the answer be stricken out on the ground that the witness had not shown herself competent to testify, but the  
1 motion was overruled. We think the ruling was correct. The objection, if well founded, should have been made before the question was answered, for the reason that the alleged failure to show the competency of the witness was as apparent before as after the question was answered. *State v. Marshall*, 105 Iowa, 38; *Blackmore v. Fairbanks, Morse & Co.*, 79 Iowa, 282.

II. The wife of the plaintiff testified as a witness, and was asked if she knew what board for such a woman as the decedent, and taking care of her, feeding her, and doing her washing and mending were worth. An objection to the question having been made, the court asked, "Do you know what board and the care of an old person was worth at that time in your neighborhood?" and answered, "Not less than \$4, if not more, for to take care of one that would be like her." The defendant moved to strike out the answer as "incompetent, no proper foundation having been laid," and the court said, "I want you to exclude her from your mind;" and the witness, having asked and received permission to answer again, said that they were worth four dollars per week. The defendant moved that the answer be stricken out because "incompetent, immaterial, no proper foundation having been laid, and not  
2 based upon any testimony in the case." The court did not rule upon the motion to strike the answer to its first question, and objections were not made to the last question, but to the answers after they were given. No

objection to the answers on the ground that they were not responsive was made, and the only ground of the last motion to strike, which would have been well taken in any event, was that the competency of the witness to testify as to the value of the board had not been shown; but that objection should have been made before the answers assailed were given.

III. Mrs. Mulqueeney testified in regard to the value of what was furnished the decedent by the plaintiff, and gave several answers which were not responsive to questions asked, but motions by the defendant to strike such answers were disregarded by the court. She was finally asked what it  
3 was worth to keep the decedent, and answered: "I would not keep her for less than \$5 a week." A motion to strike the answer because not responsive, irrelevant, and immaterial was overruled. It was clearly well founded, and should have been sustained.

IV. The will of the decedent was admitted in evidence, notwithstanding an objection of the defendant that it was immaterial. That it was material to establish the claim of the plaintiff may well be doubted, but it does not  
4 appear that there was any ruling upon the objection; hence it must be regarded as waived. *Langhammer v. City of Manchester*, 99 Iowa, 295; *Nagle v. Fulmer*, 98 Iowa, 585; *Payne v. Dicus*, 88 Iowa, 423.

V. The appellant insists that the plaintiff has not shown that the decedent was indebted to him. It was formerly the rule in this state that the burden was on the claimant of any estate to show, not merely that a contract which required the payment of money had been entered into and performed, but also that there was an amount due on account of it. *Stevens v. Witter*, 88 Iowa, 636. That rule was changed by chapter 75 of the Acts of the Twenty-sixth General Assembly, now included in section 3340 of the Code, which provides as follows: "The burden of proving that a claim is unpaid shall not be placed upon the party filing a claim against the estate; but the executor or administrator may, on the trial of

said cause, subject the claimant to an examination on the question of payment, but the estate shall not be concluded or bound thereby." That provision governs this case.

5 The plaintiff proved, in the first instance, what was required under the statute to entitle him to recover.

It is shown that the decedent was possessed of property more than sufficient to pay the claim of the plaintiff when she resided with him, and that she left his house nearly three years before her death. It does not appear that any demand for payment was made of her while she resided with the defendant, nor afterwards. But it was not necessary for the plaintiff to show attempts to collect the alleged debt, in order to show a *prima facie* right to recover, and the defendant did not examine him under the statute, on the question of payment, nor offer any evidence of payment. It is urged that, since the plaintiff introduced the will, he is bound by its declaration that the decedent did not owe debts to any one at the time it was executed. It is certainly true that, if a particular part of the will had been introduced as an admission against the interest of the testatrix, the defendant would have been entitled to have considered all parts of the will which tended to explain the part relied upon by the plaintiff. *Rouse v. Whited*, 25 N. Y. 170; *Insurance Co. v. Newton*, 22 Wall.

32; *Bradner Evidence*, 118. The purpose of the plaintiff in offering the will is not apparent. He refers in  
6 argument to a direction in the will that all just debts of the testatrix be paid, but that did not in any manner recognize the validity of the claim of the plaintiff. On the contrary, the paragraph of the will which contained that direction also contained the following: "I owe no debts to any one." The plaintiff did not introduce a part of the will merely, but all of it, without limitation as to its effect. By so doing he gave to it, as an entirety, the character of evidence in the form of the written admission or declaration of the decedent. He should not now be heard to say that only a part of the statements are credible, and that he is not bound by those against

his own interests. Had the testatrix been present and testified that she did not owe the plaintiff when the will was executed, her testimony would have been competent, and, since the plaintiff introduced her written declaration as competent, he should not be heard to deny that it is true. It is fair to him to say that he does not claim that the will should not be treated as competent evidence against him as well as for him. Since it states that the testatrix did not owe any one, it is evidence that she did not owe the plaintiff anything on the claim in controversy, for the reason that the will was made but a few weeks before the death of the testatrix, and years after the claim of the plaintiff had accrued. It was sufficient to require the plaintiff to prove that his claim was unpaid. That he did not do, or even attempt; hence the district court erred in allowing the claim, and its order of allowance is REVERSED.

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CHARLES McALLISTER v. THOMAS J. JOHNSON, Appellant.

**Malicious Prosecution: EVIDENCE.** Where, in an action for maliciously prosecuting plaintiff for shooting defendant, plaintiff testified that he shot defendant in self defense as he was coming on  
 4 plaintiff's premises through the gateway or over the fence, it was error to exclude defendant's evidence in support of his denial that he was advancing on plaintiff, showing where that portion of the charge of shot which missed him struck the fence; this tending to prove that he was sixty or sixty-five yards distant from the gate, down the road.

**SAME.** Where plaintiff in action for malicious prosecution testified that defendant at the time of shooting, out of which the prosecution arose, said, "I am on the ground that I was when I shot  
 3 at you two years ago," defendant was properly not allowed to strengthen his denial of this statement by showing the facts as to the former difficulty.

**Malice: JUDGMENT FOR COSTS AS EVIDENCE.** Under Code 1873, section 4292, requiring an indictment found at the instance of a private prosecutor to be indorsed with such person's name, and authorizing the court to award costs against him if satisfied that the prosecution was malicious or without probable cause, if the name be not so endorsed, the judgment awarding costs is void, and is not admissible against such person in an action for malicious prosecution.

108	42
119	43
108	42
121	92
108	42
127	157

**Plea and Proof:** ADVICE OF COUNSEL: *Malicious prosecution*. In an action for malicious prosecution, advice of counsel, as tending to  
1 disprove malice and want of probable cause, may be shown under general denial.

*Appeal from Dubuque District Court.*—HON. FRED O'DONNELL, Judge.

FRIDAY, APRIL 7, 1899.

ACTION to recover damages for malicious prosecution. Trial to jury. Verdict and judgment for plaintiff. Defendant appeals.—*Reversed*.

*Henderson, Hurd & Kiesel* for appellant.

*Lyon & Lenehan* and *John Hawe* for appellee.

WATERMAN, J.—The defense interposed by the answer is a general denial. The county attorney was called as a witness in defendant's behalf, and it was sought to be shown that defendant disclosed to him all the facts of the transaction before instituting the prosecution. Defendant was also asked as to the same matter, and further it was attempted to show by him what advice he received from the county attorney. This testimony was ruled out, on plaintiff's objection, and appellant's first complaint is of this action of the trial  
1 court. The ground for this holding seems to have been that the defense of advice of counsel must be specially pleaded; that it cannot be shown under a general denial. The gist of plaintiff's action was malice and want of probable cause. Advice of counsel tended to directly rebut or disprove these essential elements. *Mesher v. Iddings*, 72 Iowa, 553. This being true, evidence to establish it was admissible under the pleadings. The rule is that any evidence is admissible under such an issue which tends to disprove the facts that plaintiff is required to establish. *Johnson v. Pennell*, 67 Iowa, 669. In *Bowman v. Manufacturing Co.*, 96 Iowa, 188, the action was aided by attachment, and there was

a counterclaim for damages for the wrongful and malicious suing out of the writ. The reply was a general denial, and under it plaintiff was permitted to show that he acted under advice of counsel in instituting the attachment proceeding. On appeal by defendant, the admission of this testimony was complained of, and upon this subject it is said in the opinion: "It is insisted by appellants that the fact that plaintiff acted upon the advice of counsel was a mitigating circumstance, which should have been pleaded. But it was not shown as a mitigating circumstance, within the meaning of the section quoted. Section 2961 of the Code of 1873, in regard to attachments, provides that if, in an action on the bond, it be shown that the attachment was sued out maliciously, the plaintiff therein may recover exemplary damages. The defendants aver in their counterclaim that the allegations of the petition on which the attachment was issued were made with malice, for the purpose of procuring the writ, and to injure the defendants, and that they were injured by them. The defendants therefore allege grounds for the recovery of exemplary damages. The reply contains a general denial, and that is a denial of the allegations of malice. To sustain the issues thus formed, evidence was offered for the defendants, and it was competent for the plaintiff to offer any competent proof of the absence of malice on his part in suing out the writ. \* \* \*

The evidence in question was offered, not in mitigation of a wrong admitted, but to defeat an alleged ground of recovery which was fully denied." In the following cases it is directly held that evidence to show probable cause and the non-existence of malice is admissible under a general denial: *Folger v. Washburn*, 137 Mass. 60; *Griffen v. Chubb*, 7 Tex. 603; *Harlan v. Jones*, 16 Ind. App. 398 (45 N. E. Rep. 481); *Kellog v. Scheuerman*, 18 Wash. 293 (51 Pac. Rep. 344). Appellee cites some cases from this court in which advice of counsel was specially set up as a defense in actions like that at bar, and argues from this that the rule has been generally considered to require that such a defense be affirmatively

pleaded. We find, however, in *Johnson v. Miller* (a case that was several times in the court), that in 63 Iowa, 529, the answer was a general denial, and in 69 Iowa, 562, and 82 Iowa, 693 (presumably on the same pleadings, for there is nothing to indicate a change of issues), evidence of advice of counsel was admitted. This seems to have been the case, also, in *Logan v. Maytag*, 57 Iowa, 107. Our conclusion on this branch of the case is that the court erred in not receiving this testimony.

II. Over defendant's objection, the court admitted in evidence the following judgment entered in the criminal proceeding: "It appearing to the court that this prosecution was found at the instance of a private prosecutor, to wit, 2 Thomas J. Johnson, as shown by his own uncontradicted testimony, and the court being satisfied that the prosecution was instigated by malice, and without probable cause, the costs herein are taxed to said Thomas J. Johnson, and judgment rendered herein against him therefor, to which said Thomas J. Johnson excepts." We have serious doubts of the admissibility of this evidence, in any view of the case. We need, however, consider only one ground of defendant's objection. Johnson's name was not indorsed on the indictment, as it is provided in section 4292 of the Code of 1873 shall be done by the grand jury when the indictment is found at the instance of a private prosecutor. The basis of the court's right to tax the costs of a criminal prosecution to an individual is the action of the grand jury in returning the fact that the indictment is found at the instance of such person. Only the grand jury can know the incentive to its action. However baseless the complaint, the prosecuting witness cannot be charged with costs unless he was the inspiring cause of the prosecution. There is nothing in the record of the criminal case, outside of the recitals of this judgment, to show that Johnson had anything more to do with the return of the indictment than to give his testimony, and this may have been done in response to a subpoena. In the absence of statutory authority, the district court has no power to tax the costs in a crimi-



nal proceeding to an individual. It gets the only right in this respect from section 4292. When the grand jury fails to make the finding and indorsement there provided for, the court lacks jurisdiction to render such a judgment as the one here introduced. In *State v. Briggs*, 68 Iowa, 416, 420, we said in relation to this section: "The indorsement is required to be made to enable the court to tax the costs against a private prosecutor, if it should be satisfied that the prosecution was malicious, or without probable cause." To hold otherwise would be to practically annul section 4292. See *State v. McAllister*, 107 Iowa, 641. The court being without jurisdiction to render it, this judgment was void, and therefore open to collateral attack. *Jordan v. Brown*, 71 Iowa, 421. It was error to admit it in evidence over defendant's objection.

III. Plaintiff testified that defendant, on the night of the shooting, said: "I am on the ground that I was when I shot at you two years ago." Defendant, when examined as a witness, denied having said this; and his counsel  
3 sought to have him tell the facts as to the former difficulty between him and plaintiff. This was excluded, and properly, as we think. 1 Greenleaf Evidence, section 52. Evidence of collateral facts is not admissible merely to strengthen probabilities. *Farrell v. Webster County*, 49 Iowa, 245; *Orr v. Railway Co.*, 94 Iowa, 423; *State v. Cross*, 68 Iowa, 180.

IV. The offense for which plaintiff was prosecuted was the shooting of defendant, and it is claimed that this was done in self-defense. We find no error in the instruction on this branch of the case, or in the rulings of the court in the admission of testimony offered to impeach defendant.

V. McAllister testified that Johnson was coming upon his premises through the gateway or over the fence at that point when he shot him. Defendant offered evidence to show  
4 where that portion of the charge of shot which missed Johnson struck the fence behind him. This was ruled out. It is claimed this evidence would have shown that Johnson was sixty to sixty-five yards distant from the

gate, down the road. Johnson denied that he was advancing upon plaintiff at the time of the trouble. We think he had a right to show his location.

We need not notice other matters discussed. Some of them are not likely to arise again, and some, in view of another trial, we cannot properly express an opinion upon.—  
REVERSED.

**S. ROSENBERGER & COMPANY v. W. R. MARSH & COMPANY  
AND J. W. ALLINGTON, Appellants.**

**Evidence:** HARMLESS ERROR. Possible error in rejecting evidence as  
2 to damages for the breach of a contract, where the jury found there was no breach, is harmless.

**ADMISSIBILITY.** In an action for the price of goods sold, letters written by defendant, and containing admissions of liability to the amount of plaintiff's claim, with the exception of a few small  
6 items, and inclosing a note for the amount, less such reductions are admissible, even though an offer of compromise, where containing statements of fact proper to be considered by the jury.

**CROSS-EXAMINATION.** In an action for breach of a contract of agency to sell cigars, where the agents (jobbers of cigars, etc.) claimed a loss of trade because of being deprived of the sale of such cigars, alleged to be of a high quality, the principal may cross-  
8 examine one of the agents with reference to the manufacture and sale in the agent's town of another cigar known by the same name as the principal's cigar, and their respective merits.

**SAME.** Where defendants claimed an exclusive and continuing con-  
4 tract to sell plaintiff's cigars defendant may be cross-examined as to whether he considered the contract binding on him.

**SECONDARY.** It is proper to ask a witness if he did not write plain-  
4 tiff to do a certain thing, and it does not call for the contents of the letter.

**AGENCY.** Under a claim for a breach of a contract made by the  
4 agent of the adverse party, the latter may prove the actual authority given such agent.

**Special Damages:** PLEA AND PROOF. In a counterclaim for breach  
1 of contract, special damages not necessarily incident to the breach, such as expense in introducing goods sold the agent and loss of profits on an order taken by another agent and not turned over, must be pleaded.

108	47
111	588
108	47
117	132
117	144
108	47
121	461
108	47
128	218
108	47
135	47
108	47
137	429

AMENDMENTS. It is within the discretion of the court to refuse an amendment to a pleading, where offered during the course of the trial.

Charge and Plea: WAIVER. Where evidence is introduced without objection, it is proper to submit the issue made thereby to the jury, though not raised by the pleadings.

SAME. Evidence that the principal's refusal to carry out the contract of agency was due to the agent's fault or neglect is admissible, though not pleaded, where the agent had pleaded a wrongful discharge.

*Appeal from Hamilton District Court.*—HON. D. R. HINDMAN, Judge.

FRIDAY, APRIL 7, 1899.

ACTION at law to recover the purchase price of certain cigars sold and delivered the defendants. Defendants admit the account, but plead a counterclaim for breach of the contract under which the cigars were sold. Trial to a jury. Verdict and judgment for plaintiff, and defendant Allington appeals.—*Affirmed.*

*George Wambach* for appellant.

*J. L. Kramrar* for appellee.

DEEMER, J.—Plaintiff is a manufacturer of cigars, doing business in the city of Cincinnati, Ohio. Defendants are jobbers of cigars, bottled goods, and furniture. In November of the year 1894, plaintiff, through its agent, one Towson, sold the defendants a certain lot of cigars, and continued to supply defendants with this same brand, known as the "Imperial Sweeper," until January 3, 1896, at which time plaintiff refused to furnish any more of its goods bearing the above-mentioned brand. During the time mentioned, defendants received about one hundred and twenty thousand cigars from the plaintiff. The refusal to furnish any more cigars was

based upon the unsatisfactory manner in which defendants were settling their bills, and their alleged cutting of prices. Defendants contend that they were given the sole and exclusive agency for the hitherto mentioned brand of cigars for northern Iowa, and that they were to have this agency so long as they had any trade for the goods; that plaintiff, without cause or excuse, revoked the agency, and placed it with a jobbing house in the city of Dubuque, to their damage. Plaintiff denies that it gave an exclusive agency, or that it promised to supply the goods for any definite length of time. On these issues the case was tried to a jury, resulting in a verdict and judgment for plaintiff for practically the full amount of its claim. As there is a conflict in the evidence relating to the alleged contract of agency, and as the jury evidently found that there was no such agreement as defendants claim, that decision must be treated as a finality, and the verdict sustained, unless we find such errors committed during the trial as entitle the defendant to a reversal of the case.

Turning to the assignments of error, we find that they relate to rulings on evidence and the instructions given by the court, and of these in order as argued: Damages are asked in the counterclaim for expenses of traveling men in introducing the goods, increase in price paid for goods to fill orders taken before plaintiff revoked the agency, and loss of trade and business. On the trial, defendants offered to show that, at the time the alleged contract of agency was made, plaintiff's agent offered to turn over to them a prior order he had taken for the Imperial Sweeper cigars; that plaintiff failed to turn this order over; and that they lost thereon, the amount of which they asked to recover as part of their damages. It is manifest that these damages were special, and not necessarily incident to the breach of contract complained of. Without an allegation of such damages, defendants were not entitled to have them considered. At the time the evidence was excluded, defendants' counsel said: "I

desire to amend my answer to cover this." This is all that appears with reference to the amendment. No such amendment was ever offered. If it had been, we do not think there was error, for it was within the discretion of the court to permit or refuse an amendment offered during the course of the trial. But, aside from all this, the error, if any, was without prejudice, for the reason that the jury found there was no breach of contract. Error in rejection of evidence relating to the damages sustained would therefore be unavailing.

II. A witness introduced by plaintiff was cross-examined with reference to the manufacture and sale in Webster City of another cigar known as the "Imperial Sweeper," and as to the relative merits of the two cigars. In view of the defendants' claim as to the quality of the cigar made by plaintiff, and his loss of trade and business because of being deprived of plaintiff's goods, we see no error. The matter was brought out on cross-examination, and the extent to which this may be carried is largely discretionary with the trial court. This same witness, who was defendant in the case, was asked if he did not write plaintiff to get up something new for a leader. This was not calling for the contents of a letter, but simply calling his attention to the subject-matter thereof for the purpose of identification. He was also asked if he considered the contract binding upon him, and he answered that he did not. In view of the claim made, of an exclusive and continuing contract, this was proper cross-examination. The case of *Brown v. Hickie*, 63 Iowa, 330, is clearly not in point on this proposition.

III. Plaintiff was permitted to prove the actual authority given its agent Towson. This was certainly a material inquiry. The alleged contract was made by this agent, and, while his actual authority was not conclusive on the question as to the validity of the contract, it was a proper matter for the consideration of the jury.

IV. Certain letters written by defendants, and containing admissions of liability to the amount of plaintiff's claim, with the exception of a few small items, inclosing a note for the amount less these reductions, and referring to the  
6 revocation of the agency, were offered in evidence.

They do not seem to be an offer of compromise. If they were, they contain statements of fact which were proper to be considered by the jury. The objections to their introduction were properly overruled.

V. Certain of the instructions are criticised. One of them related to the limitations upon an agent's authority, and the necessity of knowledge on the part of one with whom he deals before he will be bound by the limitation. This  
7 instruction was clearly correct, as it was necessary to a proper presentation of the issues. The same instruction told the jury that the plaintiff would be bound by acts of its agent which were within the apparent scope of his authority, and the part complained of simply announced the exception to the rule. In view of the evidence adduced, this instruction was favorable to defendants. The court further instructed that, if plaintiff's failure to furnish cigars was due to any fault or neglect of defendants, there could be no recovery on the counterclaim. No complaint is now made of the admission of evidence relating to this matter. If it was properly introduced, then there was no error in submitting the issue made thereby to the jury, although no such claim was made in plaintiff's reply. *Collins v. Collins*, 46 Iowa, 60. But we think the evidence was admissible without such pleading, for the reason that defendants claim that they were wrongfully discharged as plaintiff's agents. We discover no prejudicial error in the record, and the judgment is *affirmed*.

JANE CLOUD v. W. H. MALVIN *et al.*, Appellants.

**Fraudulent Conveyance: EVIDENCE: Consideration.** In 1878 a mother obtained title to sixty acres of land, by voluntary partition agreed to between herself and her children. She then agreed with three of the children that if they would work this land, it should be left them by her; and they did this until 1888. In 1895  
 1 a fourth child sold the mother forty acres more. The consideration was paid by two of the said three children, and the forty was conveyed to the mother to defraud creditors of the said two. Both tracts were mortgaged. In 1888 the mortgage was foreclosed. About this time an action brought by plaintiff was pending against the mother, and she deeded to one of said two all of said 100 acres. Moreover, she devised said land to said two. This will was probated after her death and said children claim title under it. When the mother made said deeds, the land was  
 2 about to be sold under foreclosure, and it was agreed, after consultation with an attorney, that one of said two children should acquire deed under the foreclosure and then have title quieted. When the year of redemption had run and the deed had been taken, the action to quiet title could not be brought because of said litigation being then pending. The day before it resulted in judgment, said deeds were recorded. *Held:*

- a. That though the deed under foreclosure proved void, the transfer of the sixty acre tract was effectually accomplished without it; that the transfer rested on sufficient consideration by the working of said tract on part of the children from 1878 to 1898, and that said sixty acres is not subject to said judgment.
- b. The forty acre tract sold the mother by the fourth child, on  
 4 consideration paid by the two other children, with intent to defraud creditors of these two, to whom the mother conveyed it when she conveyed the sixty acres, being a voluntary conveyance, is subject to the judgment. These two who had caused the forty acres to be conveyed to their mother with said intent, cannot be heard to say against her creditors that the land was never her property by reason of said fraud, nor that the deed to them from her was a mere reconveyance sustained by the moral obligation to restore property received by fraudulent conveyance.

**ELECTION. Pleading.** Though defendants qualified as executors under said will, they are not estopped to claim under said agree-  
 8 ment or deed, they making no claim under the will in the pleadings. Besides, no election or estoppel is pleaded.

**Costs: REVIEW ON APPEAL.** Though costs are, in a suit to set aside a conveyance as fraudulent, taxed against mere lienholders, the judgment will not be reviewed where the matter was not brought to the attention of the court below.

**REHEARING.** An issue not raised on the original hearing will not be determined on a rehearing.

*Appeal from Delaware District Court.*—HON. J. J. TOLERTON, Judge.

TUESDAY, MAY 24, 1898.

ON REHEARING APRIL 7, 1899.

CREDITORS' bill to subject certain lands, the title to which is in W. H. Malvin and S. S. Malvin, to the payment of a judgment held by plaintiff against Sarah Malvin. The trial court subjected certain of the lands, and denied relief as to the remainder, and both parties appeal. As the defendants first perfected their appeal, they will be called the appellants. A statement of the issues will be found in the opinion.—*Modified*

*Dunham & Norris* and *W. H. Utt* for appellants.

*Yoran & Arnold* for appellee.

**DEEMER, C. J.**—Samuel Malvin, Sr., died intestate January 19, 1872, seized of two hundred and twenty acres of land, and possessed of personal property to the amount of about fifteen thousand dollars. His widow, Sarah, and his son Philip S. were appointed administrators of the estate. The son undertook the active management of the property, and squandered nearly all the personal assets in speculation on the board of trade. In February of 1878 he absconded and has never since been heard from. Shortly after his departure, various creditors brought suit against him, as



well as against other heirs of the deceased ; and the remaining property of the estate was levied on under writs of attachment. While these suits were pending, and on 1 or about July 16, 1878, the heirs—11 in number—met, and made a voluntary partition of the property. By the terms of this agreement, the widow was to receive sixty acres of land, in full of her distributive share, and was to assume the payment of five hundred and seventy-three dollars and twenty-three cents of a mortgage upon the land allotted to her ; Marion C. Malvin, a son, was to receive forty acres, and pay one thousand one hundred and ninety-six dollars and thirty-four cents of the mortgage, and also one hundred and twenty-six dollars and fifty-six cents to some of the other heirs ; William H. and Samuel Malvin, also sons, were to jointly receive forty acres of land, and pay two hundred and eighty-six dollars to other heirs ; Belle Malvin and Jane Cloud, daughters, were to jointly receive forty acres, and pay one hundred and sixty-five dollars and eighty-two cents ; Elizabeth Carpenter, a daughter, was to take a town lot, and pay two hundred and eight-three dollars ; and Charles Malvin and Ann Skinner, son and daughter, were to jointly receive forty acres, and pay three hundred and fourteen dollars. The other heirs were not to receive any of the real estate. At the time of this partition the mortgage to which we have referred, and which will hereafter be called the "Carpenter Mortgage," was being foreclosed ; and, as it covered the lands assigned to the widow and to Marion C. Malvin, provision was made for its payment as above indicated. Payment was not made, however, and the land covered by the mortgage was sold under execution on a judgment obtained in the foreclosure proceedings. In 1886 the widow made a report as administratrix to the county court of Delaware county, in which she stated that her son Philip had squandered the estate, that she was not liable therefor, and that all the heirs, save and except the plaintiff and appellee, who is her daughter, had released her from liability. This report does not appear to

have been approved. Plaintiff did not agree to the release of her mother, but, on the contrary, brought suit against her for maladministration, and on June 10, 1892, recovered the judgment which lies at the foundation of this suit. In the year 1885 W. H. and S. S. Malvin made conveyance of the land allotted to them, to their mother. This conveyance was evidently made with intent to defraud creditors. And at a later date, but during the same year, Marion C. Malvin conveyed to his mother the land received by him. The expressed consideration for this deed was one thousand one hundred dollars. It was paid by the brothers W. H. and S. S. Malvin, and the title was placed in the mother for the purpose of defrauding creditors. In the foreclosure proceedings of which we have spoken, the presiding judge made a memorandum in his docket on or about June 1, 1878, directing the foreclosure of the mortgage; but no decree was in fact entered until the trial of this case in the court below, when one was ordered *nunc pro tunc*. An execution had issued, however, in May of the year 1888, and the land was sold, as before stated. After the sale, W. H. Malvin, one of the sons, procured an assignment of the sheriff's certificate, which ripened into a deed on the 10th day of July 1889. In July of the year 1888, Sarah Malvin executed a will in which she devised certain of the lands allotted to her to her sons, and at the same time made deeds to twenty acres of the land to her son W. H. Malvin, and twenty acres to her son S. S. Malvin; this being the same land that they conveyed to her in the year 1885. On the 10th day of June, 1892, and shortly before plaintiff obtained judgment against her mother, there were filed for record three deeds from Sarah Malvin, the widow conveying—First, twenty acres of land to S. S. Malvin; second, twenty acres to W. H. Malvin (these being the deeds that were executed in the year 1888); and, third, a deed to the same and other lands, describing all lands of which the intestate died seized, to W. H. Malvin, the consideration being stated as two thou-

sand dollars. This action is brought to subject the lands allotted to the widow, and the forty acres deeded to her by Marion Malvin, to the payment of plaintiff's judgment. It is alleged in the petition that these last named conveyances were made to hinder, delay, and defraud the plaintiff in the collection of her judgment. The trial court set aside the sheriff's deed, and also declared the conveyance from Sarah Malvin to W. H. Malvin, which was recorded June 10, 1892, fraudulent and void. It also found that certain of the land theretofore in the name of the widow was a homestead, and exempt from the lien of plaintiff's judgment. The defendants appeal from that part of the judgment setting aside the conveyances, and subjecting the property to the payment of plaintiff's claim; and the plaintiff, from that part of the decree allowing the homestead exemption.

There is no controversy over the facts heretofore stated. The pleadings tender an issue as to the validity of the sheriff's deed, and of the conveyance to W. H. Malvin recorded June 10, 1892. It may be conceded at the outset that the sheriff's deed is of no validity, because of various and substantial defects in the proceedings, but this does not of itself entitle the plaintiff to the relief demanded. With this out of the way, the title still remains in W. H. Malvin, under the deed executed to him by the widow. Plaintiff claims that this conveyance was and is fraudulent and void, and this presents the controlling question in the case. It is agreed between all parties that the title to the sixty acres set apart for the widow shall be quieted in W. H. Malvin, and that the title to the forty acres set aside to Marion Malvin, and afterwards transferred to the widow, shall be confirmed in S. S. Malvin, unless the plaintiff has shown that the conveyances from the mother are fraudulent as claimed. A careful examination of

2 the record leads us to the following conclusions:

Shortly after the voluntary partition in the year 1878, it was agreed between the widow and W. H., S. S., and Belle Malvin that these children should remain at home, farm the

lands allotted to the mother and to each of them, and, in consideration of their running the farm, the mother was to leave the sixty acres allotted to her to them. These children remained at home and worked the farm pursuant to this agreement until the year 1888. At that time notice was given of the sale of the one hundred acres allotted to the widow and Marion Malvin under the Carpenter foreclosure, and the parties attempted to make a loan to save the sale. In this they were unsuccessful, because of the condition of the title. Upon consultation with an attorney, it was agreed to let the land go to sale; and W. H. Malvin was then to raise enough money to purchase the sheriff's certificate, and was also to take a deed to the land. The widow concluded at this time that she would give the land to her children, in consideration of labor performed, and the title was to be taken in W. H. Malvin in the manner above indicated. It was also agreed that, after the certificate of sale had ripened into a deed, an action to quiet title should be brought, and the land confirmed in W. H. Malvin. As this action could not be prosecuted inside of a year, the widow also made a will, in which she devised the land allotted to her to W. H. Malvin, and that acquired from Marion C. Malvin to S. S. Malvin. This will was intended for a mere temporary purpose at the time it was made. But it seems to have been probated since the death of the widow, which occurred February 13, 1894, and appellants are now claiming thereunder. In consummation of this 1888 agreement, W. H. Malvin procured an assignment of the sheriff's certificate, and finally acquired a deed to the land. The action to quiet title was not instituted, for the reason that appellee, Jane Cloud, brought suit against her mother for maladministration, and secured the judgment which lies at the foundation of this suit. While the litigation was pending which resulted in this judgment, and on the day before the judgment was obtained, the conveyance in question, covering the entire one hundred acres of land, was made. It was manifestly made in view of the expected judgment, and, unless

sand dollars. This action is brought to subject the lands allotted to the widow, and the forty acres deeded to her by Marion Malvin, to the payment of plaintiff's judgment. It is alleged in the petition that these last named conveyances were made to hinder, delay, and defraud the plaintiff in the collection of her judgment. The trial court set aside the sheriff's deed, and also declared the conveyance from Sarah Malvin to W. H. Malvin, which was recorded June 10, 1892, fraudulent and void. It also found that certain of the land theretofore in the name of the widow was a homestead, and exempt from the lien of plaintiff's judgment. The defendants appeal from that part of the judgment setting aside the conveyances, and subjecting the property to the payment of plaintiff's claim; and the plaintiff, from that part of the decree allowing the homestead exemption.

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Shortly after the voluntary partition in the year 1878, it was agreed between the widow and W. H., S. S., and Belle Malvin that these children should remain at home, farm the

lands allotted to the mother and to each of them, and, in consideration of their running the farm, the mother was to leave the sixty acres allotted to her to them. These children remained at home and worked the farm pursuant to this agreement until the year 1888. At that time notice was given of the sale of the one hundred acres allotted to the widow and Marion Malvin under the Carpenter foreclosure, and the parties attempted to make a loan to save the sale. In this they were unsuccessful, because of the condition of the title. Upon consultation with an attorney, it was agreed to let the land go to sale; and W. H. Malvin was then to raise enough money to purchase the sheriff's certificate, and was also to take a deed to the land. The widow concluded at this time that she would give the land to her children, in consideration of labor performed, and the title was to be taken in W. H. Malvin in the manner above indicated. It was also agreed that, after the certificate of sale had ripened into a deed, an action to quiet title should be brought, and the land confirmed in W. H. Malvin. As this action could not be prosecuted inside of a year, the widow also made a will, in which she devised the land allotted to her to W. H. Malvin, and that acquired from Marion C. Malvin to S. S. Malvin. This will was intended for a mere temporary purpose at the time it was made. But it seems to have been probated since the death of the widow, which occurred February 13, 1894, and appellants are now claiming thereunder. In consummation of this 1888 agreement, W. H. Malvin procured an assignment of the sheriff's certificate, and finally acquired a deed to the land. The action to quiet title was not instituted, for the reason that appellee, Jane Cloud, brought suit against her mother for maladministration, and secured the judgment which lies at the foundation of this suit. While the litigation was pending which resulted in this judgment, and on the day before the judgment was obtained, the conveyance in question, covering the entire one hundred acres of land, was made. It was manifestly made in view of the expected judgment, and, unless

based upon the transactions occurring in the year 1888, it is void as to the sixty acres allotted to the widow. The sheriff's sale and deed are confessedly void, and conveyed no title to W. H. Malvin. We are constrained to believe that the widow intended in the year 1888 to convey the sixty acres allotted to her to her children, who had remained at home and cared for the property, and that the title was to be conferred upon W. H. Malvin through the sheriff's sale under the Carpenter foreclosure, and finally confirmed by action to quiet title, and that the ownership of the land was so transferred. We are also led to believe that this course was taken by advice of her attorney, and that the action to quiet the title was not brought because of the litigation commenced by appellee, Cloud. When it became apparent that appellee was about to recover judgment, the widow made the conveyance to her son W. H., in order that the judgment might not be an apparent lien upon the land. If the land in fact belonged to W. H. Malvin, or to W. H. Malvin and the other heirs who remained upon the farm, at the time the conveyance of June 10, 1892, was made, then such conveyance did not operate as a fraud upon the creditors of the widow. We think, as we have said, that these heirs in fact owned the land, and that the conveyance of June 10, 1892, was not fraudulent, in so far as it covered the sixty acres allotted to the widow.

I. Appellee's counsel contend in argument that as W. H. and S. S. Malvin have qualified as executors under the will of their mother, and have accepted the provisions thereof, this constitutes an election to take under the will, and  
3 that they cannot claim under the agreement of the year 1888, or under the deed of June 10, 1892. We are not called upon to consider this question, for the reason that no election or estoppel is pleaded. It is well settled that, if not pleaded, it cannot be considered. Moreover, the defendants in their pleadings are not making any claim under this will. If there was any election, it was to take under the con-

veyance of June 10, 1892; and, as this antedated the will, they are probably bound by that election. The conveyance from Marion C. Malvin to his mother in the year 1885 was for the purpose of defrauding creditors. W. H. and S. S. Malvin furnished the consideration therefor, and the title was taken in the name of the mother for the express purpose of defrauding the creditors of W. H. and S. S. Malvin. The mother held title until the conveyance of June, 1892, and that conveyance was made for the purpose of placing the title in the name of W. H. Malvin, so that the appellee's judgment would not be a lien thereon. It does not lie in the mouths of W. H. and S. S. Malvin to say that the conveyance to their mother was fraudulent, and that they in fact owned the land. The conveyance, as between these parties and their mother, was good, and the grantors cannot be heard to impeach it for fraud. Nor will they be permitted to say that the reconveyance in June, 1892, was to transfer the title to lands fraudulently conveyed. Treating the title as in the mother in June, 1892, the conveyance made by her of the forty acres received from Marion C. Malvin was entirely voluntary, and, as she had no other property, was fraudulent as to her creditors. The sheriff's sale of the land, as we have already seen, was void; and, as defendants make no claim to a lien upon this forty acres by reason of advancements made, it follows that it should be subjected to the payment of plaintiff's judgment.

We have not cited any authorities in support of the propositions here announced. They are all so plain as to need none in their support. See, on the last proposition, *Butler v. Nelson*, 72 Iowa, 732; *Stephens v. Harrow's Heirs*, 26 Iowa, 458; *Wright v. Howell*, 35 Iowa, 288.

Our finding that the conveyance of the sixty acres to W. H. Malvin was without fraud relieves us of the necessity of considering the plaintiff's appeal as to the homestead awarded the defendants.



Defendants complain of the judgment for costs in the lower court. It appears that they were taxed against each and all of the defendants, who included, not only those claiming title, but also certain lienholders. This  
5 matter was not brought to the attention of the trial court, and was evidently not considered by it. It is well settled that a party will not be heard in this court until his grievance has been presented to, and acted upon by, the trial court. *Allen v. Seaward*, 86 Iowa, 718; *Snell v. Railway Co.*, 88 Iowa, 442; *Cox v. Same*, 77 Iowa, 20. The parties appellants and appellee will each pay one-half of the costs of this appeal.

On plaintiff's appeal *Affirmed*. On defendants' appeal *modified* and **AFFIRMED**.

SUPPLEMENTAL OPINION FRIDAY, APRIL 7, 1899.

PER CURIAM—A rehearing was granted in this case because of some doubt we entertained upon one legal proposition announced in the opinion. We found that the  
6 conveyance of the Marion forty acres to Sarah Malvin in the year 1885 was in fraud of the creditors of W. H. & S. S. Malvin, who furnished the consideration therefor, and that the conveyance by the mother in June, 1892, of this same tract was in fraud of plaintiff's rights. The point made on rehearing by appellants, and upon which our action in reopening the case was based, was that the creditors of a fraudulent grantee have no standing to complain of a reconveyance to the original grantor. We are met, however, by the objection on the part of appellee that no such issue as this was tendered on the original submission. This we find to be the case. On the first hearing, appellants rested this branch of this case solely on the claim that the conveyance to W. H. & S. S. Malvin was not fraudulent. They expressly conceded that, if the deed was fraudulent as to plaintiff, she could recover. We quote from the argument of appellants' counsel

on the original submission: "If the mother transferred the property without consideration, and solely for the purpose of putting it beyond the reach of plaintiff's judgment, then it makes no difference whether there were defects in the proceedings upon which the sheriff's deed is based, or as to the time the quitclaim was made. The conveyances would then be set aside, not because of the defects in the origin of the deeds, or in the deeds themselves, but because the plaintiff had an equitable interest in the land at the time they were made, and the attempted conveyances were consequently fraudulent." Under the circumstances, it is our duty to decline passing upon this question. We may well leave a consideration and comparison of the cases, which are in some conflict, until the issue is properly presented. We may say in this connection, without intending to announce a rule that shall be binding upon us hereafter, that the principle announced in the original opinion is not without support. See *Susong v. Williams*, 1 Heisk. 625; *Chapin v. Pease*, 10 Conn. 69; *Allison v. Hagan*, 12 Nev. 38. The original opinion is adhered to.—AFFIRMED.

### EMMA RIME V. JOHN T. RATER, Appellant.

**Breach of Promise: DEMURRER: *Statute of limitations.*** An allegation of a promise to marry sometime during the year, and that the promise was broken "before the winter of 1894." is not

- 1 demurrable because of the statute of limitations. That statute does not begin to run until breach where, as here, the promise is
- 1 general, and, therefore, continuous; and the petition does not state the exact date when the breach occurred.

**STATUTE OF LIMITATIONS.** Assuming (but not deciding) that action on breach of promise is barred in two years, it was not error to refuse a charge that plaintiff's action was barred, when the original petition did not fix the date of breach and an amendment averred

- 2 postponement from time to time to a date more than two years after the promise, and a renunciation of the promise then, the court having instructed that plaintiff could not recover unless refusal to marry was made at said last date, the only one definitely fixed in the pleading, no other breach being relied on.

108	61
113	342

108	61
118	502

108	61
131	206

108	61
1143	114

**EVIDENCE.** Direct evidence of the promise is not required. It may be inferred from behavior during a period of years, and is often  
8 made out by attentions shown, exchange of presents, purchase of clothing and preparation for the marriage relation.

*Same.* Witness may state what defendant said in a letter to plaintiff, part only of which he saw, loss of the letter being shown.

*Same.* Evidence of the wages of an engineer on a certain railroad is admissible, in action for breach of promise to marry, to show  
5 defendant's ability to earn money, and the condition in life which  
7 plaintiff might reasonably have received in consummation of the contract, defendant at one time having been such engineer.

*Harmless error.* Admission of testimony is without prejudice, the  
7 same state of facts having been testified to by another without objection.

*Same.* Testimony of witness in action for breach of promise that defendant paid plaintiff a good deal of attention is admissible;  
9 but, if not, is without prejudice, where witness fully explains what she means, and states what defendant did to show his affection.

*Mental suffering.* Plaintiff's testimony as to her mental suffering is  
8 admissible in an action for breach of promise.

*Refusal.* Action for breach of promise to marry will lie, without  
4 request on plaintiff's part, where defendant refused to marry plaintiff.

*Gross examination.* The evidence of wages received being admissible,  
6 only, to show ability to earn money, and the condition in life which plaintiff might reasonably have attained by the marriage, it is not proper cross-examination to inquire whether defendant was blacklisted during a railroad strike.

**DAMAGES.** Proofs of specific elements of damage are not necessary  
10 in an action for breach of promise, and some recovery is surely warranted where evidence of mental suffering is without conflict.

**DEFENSES.** That plaintiff was hysterical or subject to nervous or convulsive fits, is no defense to the action. (Held, *arguendo*—REPORTER.)

*Appeal from Davis District Court.*—HON. T. M. FEE, Judge.

FRIDAY, APRIL 7, 1899.

ACTION for breach of promise of marriage. Trial to a jury, verdict and judgment for plaintiff, and defendant appeals.—*Affirmed.*

*Steck & Smith* for appellant.

*Payne & Sowers* for appellee.

DEEMER, J.—This action was commenced on the 16th day of February, 1897, and the petition alleges a promise to marry some time during the year, but before the winter of 1894, a breach thereof, and a refusal of the defendant to comply with his promise. Defendant demurred to the petition on the ground that the action was barred by the statute of limitations. This demurrer was overruled and exceptions duly taken. Thereupon defendant filed an answer denying the allegations of the petition, pleading the statute of limitations, and further alleging that for a long time plaintiff has been hysterical, and subject to nervous and convulsive fits, which fact was unknown to defendant until the last time he was in her company; and that, by reason of her condition, she would not make a suitable or desirable wife. During the course of the trial plaintiff filed an amendment to her petition, in which she alleged that in November, 1894, at defendant's request, the marriage was postponed until the spring of 1895, and that when springtime came defendant said he would come and see her in June; that defendant did not come to see her in June, or make any further arrangements until November of the year 1896, at which time he informed plaintiff that he would not marry her. To this amendment defendant interposed a general denial.

Defendant contends that his demurrer should have been sustained, and he bases his claim upon subdivision 1 of section 2529 of the Code of 1873 (the action having been  
1      tried before the adoption of the new Code), which reads as follows: "Actions founded on injuries to the person or reputation, whether based on contract or tort or for a statute penalty, [shall be barred] within two years [after their cause accrues]." It will be observed that the original petition did not state the exact date when the breach

occurred. The promise was general, in which no exact time was fixed, and was therefore continuous, and the statute did not begin to run until a breach thereof, either by one of the parties having put it out of his or her power to perform, by marrying another, or by notice of a purpose not to perform, or by an absolute refusal to perform. *Blackburn v. Mann*, 85 Ill. 222; *Kelly v. Renfro*, 9 Ala. 325; 44 Am. Dec. 441. As a general rule, if the date for the marriage is not definitely fixed, there is no breach until request be made, or until one or the other of the parties has put it out of his power to perform. *Prescott v. Guylor*, 32 Ill. 323; *Shellenbarger v. Blake*, 67 Ind. 76; *Holloway v. Griffith*, 32 Iowa, 409; *Fible v. Caplinger*, 13 B. Mon. 464. As the petition did not state the exact time of the breach, but counted upon a promise which was continuing, there was no error in overruling the demurrer.

Defendant also asked instructions to the effect that, if the breach occurred more than two years prior to the bringing of the suit, plaintiff's action was barred, and she  
2 could not recover. These instructions were refused.

In this there was no error; for plaintiff, in the amendment to her petition, alleged a postponement of the time for marriage from time to time, until the renunciation by the defendant of his promise, in the year 1896. This is the first and only pleading which fixed the time for the breach, and the trial court correctly instructed that plaintiff could not recover unless she established the defendant's refusal to marry at or about November of the year 1896. As defendant denied the promise of marriage, and as plaintiff did not claim a breach at any other time than the one stated, the instructions given were correct, and there was no error in denying defendant's requests. If it be conceded that the court was in error in overruling defendant's demurrer to the original petition, the error was without prejudice, by reason of the matters just recited. We are not to be understood as holding that the action was barred in two years from the time the cause thereof arose. To say the least, this is a debatable

proposition, and one on which the authorities are not wholly agreed. But see *Hanson v. Elton*, 38 Minn. 493 (38 N. W. Rep. 614). We simply say that, conceding the statute relied upon applies, there was no error in overruling the demurrer and denying the requests for instructions.

II. Next it is insisted that the verdict is not sustained by sufficient evidence. While it must be conceded that the courtship was very Platonic in character, and that the evidence as to promise is largely circumstantial and inferential, yet we think there was enough to sustain the verdict.

3 Direct evidence of such a promise is not required. It may be inferred from the conduct and behavior of the parties, extending over a period of years, and is often made out by evidence of the attention paid by the one to the other, exchange of presents, purchase of clothing, and preparation for the marriage relation. *Thurston v. Cavenor*, 8 Iowa, 155; *Royal v. Smith*, 40 Iowa, 617; *McConahey v. Griffey*, 82 Iowa, 564.

III. It is said that there is no evidence that plaintiff was ready and willing to marry the defendant, and no showing that defendant refused to marry her. There was evidence  
4 tending to show that defendant refused to marry plaintiff in November of the year 1896, and the jury must have found that such fact was established, for the instructions required them to so find before returning a verdict for plaintiff. If the defendant did refuse to marry plaintiff, then no request on her part was necessary. *Coil v. Wallace*, 24 N. J. Law, 291; *Kelley v. Brennan*, 18 R. I. 41 (25 Atl. Rep. 346); *Olson v. Solverson*, 71 Wis. 633 (38 N. W. Rep. 329); *Kurtz v. Frank*, 76 Ind. 594.

IV. A witness was permitted to state, over defendant's objections, the wages of an engineer on the Wabash Railroad. It appears that defendant was at one time such  
5 an engineer. This evidence was proper, for the purpose of showing defendant's ability to earn money, and the condition in life which plaintiff might reason-

ably have received by a consummation of the contract. *Stratton v. Dole*, 45 Neb. 472 (63 N. W. Rep. 875). As another witness testified to the same state of facts without objection, there was no prejudice, in any event. As the evidence was admissible for this purpose alone, the court did not err in

6 denying to defendant the right to cross-examine the witness as to his (defendant's) being blacklisted at the time of the strike, in July, 1894. In any event it was not cross-examination. *Lawrence v. Cooke*, 56 Me. 187. Another witness testified that defendant's father

7 owned a farm of two hundred acres at the time he died; that he had never heard of defendant's disposing of his interest; and that he lived on the farm ever since his father's death, except when railroading. True, much, if not all, of this evidence was hearsay, but its admission was without prejudice, because of the fact that one of the defendant's own witnesses testified to practically the same state of facts without objection. It seems to be well settled that defendant's interest in his father's estate was a proper matter of inquiry. *Clark v. Hodges*, 65 Vt. 273, (26 Atl. Rep. 726). The authorities seem to hold, without dissent, that defendant's reputed wealth is a proper matter of inquiry in an action for breach of promise. *Geiger v. Payne*, 102 Iowa, 581; *Reed v. Clark*, 47 Cal. 194; *Hunter v. Hatfield*, 68 Ind. 422; *Chellis v. Chapman*, 125 N. Y. 214, (26 N. E. Rep. 308); *Oritz v. Navarro*, 10 Tex. Civ. App. 195 (30 S. W. Rep. 581).

Plaintiff was asked as to why she did not preserve certain letters she received from defendant. Her answer to the question was hardly responsive, but the answer was without prejudice. Plaintiff was also asked as to mental pain

8 and suffering caused by defendant's inattention during the summer of the year 1895, and also after the alleged breach of promise. This was objected to, but the objection was overruled, and she stated that she did suffer mentally. This evidence was proper. *Robinson v. Craver*, 88 Iowa, 381.

A witness was permitted to state that defendant paid plaintiff a good deal of attention. Such evidence was admissible. *Pelamourges v. Clark*, 9 Iowa, 17. In  
9 any event, the answer was without prejudice, for the witness explained fully what she meant, and stated what the defendant did to show his affection. Another witness was permitted to state what he said in a letter received by plaintiff from defendant, part of which only he saw. Loss of the letter was fully shown, and we think there was no error in admitting the evidence, although he did not read the entire letter.

V. In the sixth and seventh instructions the court told the jury that, if plaintiff had established the contract and its breach, then she was entitled to recover, and that the verdict should be in her favor for some amount, to be fixed by them. These instructions were correct. Plaintiff was surely entitled to nominal damages, and the evidence shows, with  
10 out conflict, that she suffered mental anguish. Proof of specific elements of damage was not required, and the whole matter was, of necessity, left largely to the sound discretion of the jury.

There was no evidence that plaintiff was hysterical, or subject to nervous or convulsive fits, and the trial court correctly refused to submit that issue to the jury. If  
11 there was such evidence, it would not be a defense to the action. *Simmons v. Simmons*, 8 Mich. 318.

Some other errors are assigned, which are not of sufficient importance to be noticed in an opinion. They are all disposed of in what has already been said, and require no further mention. There is no prejudicial error in the record, and the judgment is AFFIRMED.



108	68
115	682
108	68
122	4
108	68
126	503
103	68
131	9
108	68
139	483

### STATE OF IOWA V. HENRY A. HOUSE, Appellant.

**Larceny: Jury question.** Shortly after defendant left a relative's house, where he had been visiting, they missed some gold coin and paper money. No one else except the family had free access to the room where the money was kept, and defendant knew the money was kept there and was once found in the room where it was kept. Defendant purchased a ticket to a place to which he had previously stated he was going, but instead, he went directly to another place; claiming to have done so to avoid riding on a freight train. The following day he deposited in a bank in the latter place money corresponding substantially with

2 that missed. He claimed to have had the coin a number of years, keeping it in a purse which he lost before he made his visit, but the finder testified that there was no gold in the purse. Defendant had a small account with the bank and claimed to have had a large amount of money at interest during all the time he claimed to have had the gold. He does not explain why he failed for so long to deposit the money he claims to have carried, nor why he did not also put it on interest. *Held*, that a conviction of larceny was sustained, though defendant's good character was proven.

**CHARACTER AS EVIDENCE.** Good character is not a defense, but

1 should be considered, in connection with all the other facts, in determining guilt; its weight being solely for the jury.

**INSTRUCTION: Requesting.** In a case where the evidence is wholly circumstantial, where the court charges that if the facts are proven beyond reasonable doubt, sufficient to satisfy the jury of defendant's guilt beyond all reasonable doubt, they may convict—error cannot be predicated on its failure to add, *of its own motion*,

3 that conviction must be consistent with every reasonable hypothesis of guilt, and inconsistent with any reasonable hypothesis of innocence.

**Same.** The rule that there should be no conviction on circumstantial evidence unless the facts establish the guilt beyond all reasonable

4 doubt and be incompatible with any reasonable hypothesis of innocence, does not refer to all facts, but to such as are essential to conviction.

*Appeal from Dubuque District Court*—HON. J. L. HUSTED,  
Judge.

FRIDAY, APRIL 7, 1899.

THE defendant appeals from a judgment of conviction for the crime of larceny.—*Affirmed.*

*Henderson, Hurd, Lenehan & Kiesel* for appellant.

*Milton Remley, Attorney General*, for the State.

LADD, J.—The fact that the defendant has borne a good reputation for probity, and acquired a fair education, cannot avail to shield him from the penalty of his crime. That persons so situated do sometimes violate the penal statutes of the state is evident from the rule permitting proof of good character and reputation with respect to the trait involved. This is not because such proof is a defense, but on the ground that one of such character and repute would not be likely to commit the particular offense charged. *State v. Orniston*, 66 Iowa, 151. The instructions conveyed this thought to the jury in the following language: “While such good character does not of itself constitute a defense, yet it is a circumstance which should be considered, in connection with all other facts and circumstances in evidence before you, in determining the guilt or the innocence of the defendant. Its weight and value are to be determined by you, and if, in connection with all other facts and circumstances in evidence before you, you have a reasonable doubt of the defendant’s guilt, you should acquit him.” This is not like the instructions condemned in *State v. Gustafson*, 50 Iowa, 196, and *State v. Lindley*, 51 Iowa, 344. In the former the jury was told such evidence could not overcome positive evidence of guilt, and in the latter, “that it could not avail as against facts positively or strongly proven.” See, also, *State v. Horning*, 49 Iowa, 158. The portion of the charge quoted finds approval in *State v. Northrup*, 48 Iowa, 585, where it is said: “We must not be understood as saying that good character is a defense, for it is not, as a matter of law. But it is a fact for the consideration of the jury, as are all the other facts in the case, and they must determine

its weight in all cases." The appellant asserts that in directing good character to be considered in connection with all other facts and circumstances, by fair inference, something more than such proof was required in order to warrant an acquittal. Certainly the jurors were bound to take into consideration all the evidence introduced, in passing on the main issue, and might not, in doing so, exclude facts and circumstances shown on the trial. The weight to be attached to proof of good character, when thrown in the scales, was rightly left entirely to their judgment, and its sufficiency or insufficiency to authorize an acquittal was alone for their determination.

II. We cannot say only one conclusion might reasonably be drawn from all the evidence. John Parrott and his wife, an aunt of the defendant, resided at Worthington, Dubuque county, and kept their ready money in a drawer of a bureau in their bed room, just off the sitting room. There were ten or eleven twenty dollar gold pieces, a like number of ten dollar gold pieces, and some paper money. The defendant arrived at their home, for a visit, November 5, 1896. On that day, Mrs. Parrott, in his presence, procured the key from another drawer of this bureau, unlocked the particular drawer, and gave the defendant one dollar with which to purchase meat. He remained at their home, occupying a room in the second story of the house, until November 12, at about 8 o'clock A. M. About noon Mrs. Parrott discovered that the money had been taken. In the morning she had found the defendant in this bed room, though he had no occasion to go there; and the evidence tends to show that no one else, except the Parrotts, had free access to that room. The defendant purchased a ticket to Mapleton, Minn., but went directly to Albert Lea, in that state. The purchase of the ticket was doubtless because of his previous statement to Parrott that he was going to Mapleton, and the defendant's explanation of his change of route (i. e. to avoid riding on a freight train) may well be questioned, as he might have

ascertained the accommodations before obtaining the ticket. The following day he deposited in the First National Bank of Albert Lea three hundred and twenty-eight dollars and thirty-five cents in gold coin and other money, corresponding substantially with that in the bureau drawer. His explanation of its possession is not satisfactory. A part of the identical gold so deposited he claims to have had since 1891, and most of it for four or five years; that in an old pocketbook in a package he left it in the bank in 1895, afterwards took it to Chicago, where he engaged in a business enterprise, returned it to the bank, and again carried it to Chicago; and that, when going to Parrott's, he carried it in a Russia leather pocketbook. But during this time he had an account with this bank, ordinarily depositing sums of less than \$50, though at times more, and in one instance \$300, which he had borrowed of the bank. How did it happen that he carried all this gold about with him, while he was depositing items with the bank nearly every month, and sometimes oftener? And what suddenly moved him to yield this treasure on that particular day, after keeping it intact so long? Again, the defendant claimed to have kept money earned by him out at interest, to the amount of three thousand five hundred dollars, but he failed to explain why he did not care to obtain the increase on this gold. True, his brother and another say he had a considerable sum of money in this pocketbook in Chicago. But he stopped with Knapp the night before he went to Parrott's, and there lost this identical purse. Knapp found it, and, though the defendant insists that the money afterwards deposited was in it, testified that it contained no gold. In the light of this evidence, the jury may well have concluded that, when defendant went to Parrott's home, he had no gold in his possession; that the money in the bureau drawer disappeared during the time of his visit, and could have been taken by no one else; that he had a similar amount of money, of like character, soon thereafter, and gave an unreasonable explanation of its possession.

While it is possible that the defendant may have been the victim of untoward circumstances, it is not at all probable. In such a case the conclusion of the jury is final, notwithstanding the evidence of good character.

III. It will be observed that the state relied wholly on circumstantial evidence. The court, after defining direct and circumstantial evidence, instructed the jury that "if facts and circumstances are proven beyond reasonable  
3 doubt, sufficient to satisfy you of the guilt of the defendant beyond all reasonable doubt, such evidence is sufficient to justify you in finding the defendant guilty. If, however, the state has failed to prove facts and circumstances beyond reasonable doubt, sufficient to satisfy you of the guilt of the defendant beyond all reasonable doubt, then it is your duty to acquit the defendant." The appellant complains that the usual caution, that conviction must be consistent with every reasonable hypothesis of guilt, and inconsistent with any reasonable hypothesis of innocence, was not given. True, the jury must be instructed on all material issues of the case. *State v. Carnagy*, 106 Iowa, 483, and cases cited. But where an instruction is correct as given, though not as explicit as desired, error cannot be predicated thereon, in the absence of a request. *State v. Illsley*, 81 Iowa, 49, *State v. Watson*, 81 Iowa, 380, *State v. Helvin*, 65 Iowa, 289, *State v. Tweedy*, 11 Iowa, 350, *State v. Hathaway*, 100 Iowa, 225; *State v. Gaston*, 96 Iowa, 505; *State v. Woodward*, 84 Iowa, 172. Nor need an instruction on each special phase of the case be given unless requested. *State v. Miller*, 65 Iowa, 65; *State v. Stevens*, 67 Iowa, 557; *State v. Nadal*, 69 Iowa, 483. There was no error in the omission. The Texas cases relied on by appellant are based on a statute requiring the judge, in all actions for felony, to "distinctly set forth the law applicable to the case, whether asked or not." This appears to have been interpreted to mean every phase or detail developed on the trial. If so, then, when any point is omitted by the court, as by oversight or mistake,

even though counsel are fully aware of it, they may remain silent, and, without any request that the point be covered by the charge, secure a reversal. We agree with the supreme court of Indiana, as stated in *Powers v. State*, 87 Ind. 153, that "such a practice would be wrong in theory and mischievous in results." 2 Thompson Trials, section 2340. The instruction requested was erroneous. Not all the facts as  
4 herein stated, but only those essential to conviction, must be established beyond a reasonable doubt, and be incompatible with any reasonable hypothesis of innocence. Besides, many facts may be fully established in defendant's favor, and yet, from others, defendant's guilt found. *State v. Cohen*, 108 Iowa post.

IV. The exceptions to the rulings on the admissibility of evidence are trivial. Whether the defendant had been a suitor of the daughter of a witness' brother, or whether he did as a witness to character stated he heard one Register declare, were collateral matters, which could in no way aid in reaching a just conclusion. The record refutes the claim, made in argument, that the defendant was not accorded a fair and impartial trial.—AFFIRMED.

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STATE OF IOWA V. GEORGE WRAND AND THOMAS HAWLEY,  
Appellants.

**Burglary: INDICTMENT.** Though an indictment for burglary must  
1 set out the owner of the building entered, a mistake in the Christian name of such owner, and owner of the goods intended to be stolen, is immaterial, in the absence of prejudice to the accused.

**Escape.** An attempt of accused, under indictment, to escape, is a  
4 circumstance proper to be shown and considered by the jury, though it tends to prove a distinct offense.

**Finding stolen goods.** Property stolen at the same time and place is  
5 properly received in evidence against one accused of stealing other property, where it was found on the person of one jointly indicted with accused; they being seen together before and after the burglary.

108	73
109	68
108	73
127	291
108	73
129	265
108	73
143	57

**Minutes on Indictment: SUFFICIENCY.** The grand jury's minutes of the evidence of a witness before the committing magistrate stated that, on or about April 18th, 19, marshal of R., apprehended defendants with four others, in the stock yards in R., that defendant L. was first arrested, and on his person was found a piece of black velling and a portion of a bolt of dress goods, which were identified by M. as part of the stolen property; that defendants H. and B. sold W. a coat and vest, which were identified as part of the stolen property, on the same day. *H. H.*, that under Code, section 5272, requiring a "brief minute of the substance of the evidence" to accompany the indictment, this was sufficient, in connection with the names of the states' witnesses indorsed on the indictment, to apprise accused of the witnesses the state would call, and the matters relating to which they would testify.

**EVIDENCE: Minutes no limitation.** The state is not confined to the 3 minutes in examining the witnesses.

*Appeal from Tama District Court.*—HON. OBED CASWELL, Judge.

FRIDAY, APRIL 7, 1899.

THE defendants appeal from judgment convicting them of burglary, and sentencing each to a term of five years in the penitentiary.—*Affirmed.*

*Tom. H. Milner* for appellants.

No argument for the state.

LADD, J.—In the indictment, ownership of the building entered, and of the goods intended to be stolen, is laid in James A. Morrow. The proof showed that these belonged to, and were in possession of, John A. Morrow. Was this a fatal variance? As it was not necessary to allege or prove who owned the goods, *State v. Jennings*, 79 Iowa, 514, a mistake in pointing out the true owner thereof will be disregarded (Code section 5290); *State v. Ean*, 90 Iowa, 534; *State v. Ormiston*, 66 Iowa, 143; *State v. Ansaleme*, 15 Iowa, 44; *State v. Schilling*, 14 Iowa, 455). The owner of the building must be averred in an indictment for burglary. *State v. Morrissey*, 22 Iowa, 158. But this court has uniformly held, under section 5286

of the Code, that, in the absence of any prejudice, an erroneous allegation of the name of the party injured is immaterial. The following cases are precisely in point. *State v. Carr*, 43 Iowa, 420; *State v. Crawford*, 66 Iowa, 318; *State v. Porter*, 97 Iowa, 450. The store of John A. Morrow, at Garwin, was broken and entered at the time alleged, and some of the goods then taken therefrom were found in the possession of the defendants. With several others, they were in town the day before—pedestrians wandering about without visible calling. No prejudice whatever resulted from the mistake in the Christian name of the owner.

II. The grand jury based the indictment entirely on minutes returned by the committing magistrate, and, as required by section 5272 of the Code, "a brief minute of the substance of the evidence" was written by its clerk, and returned with it. This, in narrative form, concisely stated the facts. Objection was made to each witness on the ground that minutes of his testimony were not attached to the indictment. As an illustration, we set out that portion concerning Powderly and Watson: "That on or about the 13th day of April, C. C. Powderly, marshal of Reinbeck, 2 Iowa, apprehended the defendants, together with four other men, in the stock yards at Reinbeck. The defendant Lorraine was the first one arrested, and upon his person was found a piece of black veiling and a portion of a bolt of dress goods, which were identified by Mr. Morrow as part of the stolen property, and were introduced in evidence, and marked Exhibits A and B. On or about the same day the defendants Wrand and Howley sold to George E. Watson, of Reinbeck, Iowa, a coat and vest, which were identified as being a portion of the stolen property, and were introduced in evidence, and marked Exhibit C." Very evidently, these facts were extracted from the minutes of the justice, and were testified to by these witnesses. Not the substance of the evidence, but a brief minute thereof, is required; and we think that the defendants were not only advised by this min-



ute, in connection with the names indorsed on the indictment, of the names of the witnesses the state would call, but of the matters relating to which they would speak. The mere brevity of the evidence furnishes no reason for its exclusion. *State v. Van Vleet*, 23 Iowa, 27; *State v. Bowers*, 17 Iowa, 48. Nor was the state confined to such minutes in  
3 examining the witnesses. *State v. McCoy*, 20 Iowa, 262; *State v. Ostrander*, 18 Iowa, 435.

III. The sheriff detected the defendants, while in jail, attempting to escape by sawing the iron bars of their cell. They insist the evidence of this was inadmissible, because  
4 tending to prove a distinct offense. True, the commission of another crime may not be proven for the sole purpose of showing that the defendant would be the more likely to have committed that charged. *State v. Rainsbarger*, 71 Iowa, 746. See *State v. Brady*, 100 Iowa, 191. But if the evidence is material and relevant to the issue, the mere fact that it tends to establish guilt of a crime other than the one alleged furnishes no ground for its rejection. *People v. Place*, 157 N. Y. App. 584 (52 N. E. Rep. 576). That an attempt to escape is a circumstance proper to be shown and considered by the jury, is put beyond controversy by the authorities. *State v. James*, 45 Iowa, 412; *State v. Arthur*, 23 Iowa, 430; *State v. Ruby*, 61 Iowa, 86; *State v. Stevens*, 67 Iowa, 558.

IV. The black veiling and a piece of dry goods found on Lorraine, jointly indicted with defendants, were properly received in evidence. These were identified as taken from  
5 the store at the same time as the coat and vest defendants had sold. All were seen together before and after the burglary.—AFFIRMED.

**JAMES A. VOORHEES, Contestant, Appellant, v HIRAM  
ARNOLD, Incumbent.**

**Australian Ballot: IDENTIFICATION MARKS.** Under code, sections 1119, 1120, providing that election ballots must be marked with a cross in the circle at the head of a ticket, or in squares opposite the names of the candidates, and that ballots marked in any other way, "so that such mark may be used for the purpose of identifying such ballot," shall be rejected—where the unauthorized mark is not of a character to be readily used for such purpose, or is made accidentally or through inexperience in the use of a pencil, the ballot must be counted, but where the mark may be so used and is made deliberately, the ballot must be rejected.

**SAME.** Where the voter writes the name of person below the printed ticket on the margin of the ballot, the ballot must be rejected.

**SAME** Where the printed ticket has a blank in which to write the name of a candidate, and the voter places a cross in the square opposite such blank, but writes no name therein, the ballot must be rejected.

**SAME.** Where a part of the ticket of one party is printed at the bottom of the ballot with blanks in which to write the names of candidates, and the voter marks his ballot in the squares only, placing a cross therein opposite the candidates of that party, except in one instance, and writes the name of a candidate in one of the blanks, but does not place a cross in the opposite square, the ballot must be rejected.

**SAME.** Where the voter writes the name of a constable below and on the margin of a ticket, without making a cross, the ballot should be rejected.

**SAME.** The law does not recognize the writing of a name on the ballot except by inserting it in the ballot in the proper place.

**SAME.** There are cases where the cross has many additional marks, made in an effort to mark properly, where, yet, every additional mark makes a wider departure from a correct cross and, in some, there is more than a cross. Yet, these should not be rejected unless the departure was deliberate and may be used to identify. In fact the departure may be so complicated that it may be held, as matter of law, not to constitute an identification mark, for the reason that the maker could not well describe it to another.

**JURY QUESTION.** A doubtful question as to whether unauthorized marks were made with deliberate intent, and can be used to identify the ballot, is one of fact for the trier,

108 77  
110 517  
110 564  
1110 565

108 77  
112 474  
1112 475

108 77  
1115 485  
1115 485

108 77  
138 222

SAME. Where a voter marks his ballot in the squares, in several of which it is doubtful whether the lines really form a cross, and in  
10 one of which the lines just meet, so that no cross is formed, the question whether the departure from the prescribed markings was deliberate, or merely accidental or careless, is one of fact for the trior.

SAME. Where a voter marks a ballot in the squares opposite the names of the candidates of one party, except in three instances, and opposite the name of the other party for one of the same  
8 offices is a dirty spot, as if rubbed with the finger, covering and extending below the square, but without the slightest indication  
9 of the making of a cross in the square, the finding of the court on the doubtful question of the voter's intent and the effect of such marking must prevail.

SAME. Where a voter places a cross in the circle at the head of the ticket of one party, draws a line from the top of the perpendicular line of the cross downwards to the horizontal at an angle of about thirty degrees, places a cross in the circle opposite the ticket of another party, and then attempts to rub it out, and leaves a dirty spot much larger than the circle and faint tracings of the cross in the circle, the rejection of the ballot will not be interfered with.

Appeal: REVIEW FOR APPELLEE. One who wins below may show without appealing or assigning error, that, upon the face of the  
15 record, the court below erroneously ruled against him and that if the right ruling had been made the error against appellant would be harmless.

TRIAL DE NOVO. The question whether a mark on a ballot was deliberate and usable to identify, is not tried *de novo* on appeal.  
14

*Appeal from Jones District Court.*—HON. H. M. REMLEY,  
Judge.

FRIDAY, APRIL 7, 1899.

At the general election in 1897, contestant was the Democratic, and incumbent the Republican, candidate for the office of sheriff of Jones county. The board of county canvassers, on the face of the returns, declared the incumbent, Arnold, elected, the returns showing a majority in his favor of seven. Voorhees contested the election, and the court of contest found Arnold elected by a majority of three. On appeal to the district court, the case was tried without a

jury, and again decided in favor of Arnold by a majority of four; and from a judgment in his favor Voorhees appealed. Arnold also appealing from certain rulings against him.—*Affirmed.*

*C. J. Cash, B. H. Miller, Geo. H. Bennett and Jamison & Smyth* for contestant.

*Ellison, Ercanbrack & Lawrence* and *B. E. Rhinehart* for incumbent.

GRANGER, J.—I. The legal propositions are exclusively as to the validity of ballots counted or rejected. The alleged defects are as to markings, and we have certified to us upwards of two hundred and forty ballots, because of the inaccuracy of those presented in the abstracts. As it is a law action, the case comes to us on assignment of errors, and counsel in its preparation, as well as this court in its consideration, have experienced a difficulty in the adoption of a system by which the multitude of questions may be considered without the labor of doing so in detail. For this purpose counsel have resorted to a system of classification by which ballots somewhat, or quite, similar as to the markings have been classed together, thus bringing together for consideration numerous assignments. As would be expected, counsel have not been able to agree in the particulars of classification, nor have we been able to use any system suggested by counsel or devised by us. The rulings of the district court were as to particular ballots, and we have found it necessary, in our examination of the case, to look to each ballot, and determine the question involved in its acceptance or rejection, independently of every other ballot. That we cannot, in an opinion, express conclusions on all these questions is apparent, nor is it necessary. We think it is proper, at the outset, to settle some general rules of law, as to ballot markings, that will, of themselves, be decisive of many of the questions presented; for many of them present

no disputed questions of facts for ascertainment, while others do present such questions.

Most of the questions go to the validity of the ballot as a whole, rather than as to its validity as a vote for the office of sheriff; that is, the questions are, mainly, if the ballot is not so marked that the mark may be used for the purpose of identifying the ballot, so that, under the law, it must be rejected. Ballots must be marked by a cross placed  
1      in the circle at the head of a ticket, or in squares  
opposite the names of candidates, and in no other way.

Code, section 1119, 1120. In the latter section it is provided: "Any ballot marked by the voter in any other manner than as authorized in this chapter, and so that such mark may be used for the purpose of identifying of such ballot, shall be rejected." The purpose of this provision is to preserve secrecy of the ballot. Since the case of *Whittam v. Zahorik*, 91 Iowa, 23, was determined, the law has been somewhat changed, but, as to identifying marks, it is now substantially as we construed it to be then. We there held, because of a criminal provision against identifying marks, that the law, by implication, prohibited any person, including the voter, from so marking a ballot, and that such ballots could not be counted. The present law, in terms, requires that ballots marked so that the marks may be used for the purpose of identification shall be rejected. In that case, after a specification of particular marks fatal to a ballot because they could readily be used as identifying marks, we used this language: "It is not practicable to adopt a rule in regard to identifying marks which would be applicable to all cases. It will not do to say that all ballots which bear marks not authorized by law should be rejected. All voters are not alike skillful in marking. Some are not accustomed to using a pen or pencil, and may place some slight mark on the ballot inadvertently, or a cross first made may be clumsily retraced. It is evident that in such cases, and in others where the unauthorized mark is not of a character to be used readily for the purpose of identi-

fication, the ballot should be counted ; but where the unauthorized marks are made deliberately, and may be used as means of identifying the ballot, it should be rejected." The language quoted is equally applicable to the present law, and the inference is clear that, in some cases, identifying marks are so apparent, or conclusively identifying, that the court may say, as a matter of law, that they may be used for that purpose, and hence the ballot should be rejected. The unauthorized marks, to be identifying, must be deliberately made, as we said in the *Whittam Case*, and not be merely accidental, or the result of inexperience in the use of pen or pencil, or a mere effort to correct what may be thought to be an improper marking. If a cross is placed outside the circle or square, instead of being placed substantially in it, as the law requires, or if the word "Yes" is written in the circle, instead of placing a cross there, it may be said, as a matter of law, to be deliberately done, and that it might be used for identification, and defeat the ballot. These are but two of many instances that could be mentioned. In this case, the markings in the circle, at the head of the ticket, are of great variety; some of them bearing evidence of being a deliberate departure from the requirements of making a cross, which must be two lines crossing each other. In nearly every instance there is a cross, and then added marks,

- 2 and in some cases there are so many as to present a practically indescribable figure or character. In some of these extreme cases it is manifest that all was done in an effort to properly mark the ballot, even though every added mark was farther from the correct one. In some of these there is more than a cross in the circle, but for this reason the ballot is not to be rejected, unless the departure is deliberate and may be used to identify the ballot. On some of the ballots, in this case, where there is a wide departure from
- 3 the legal requirements, we may safely say the unnecessary marks could not be used for identification, because the maker could never describe them to another so

far as to permit of their use for that purpose. In other cases it is doubtful whether they could be so used or not.

4 In such cases the question is one of fact for the jury, because there might reasonably exist differences of opinion as to the fact. In such cases the ballot should be put in evidence, and the jury permitted, under instructions, to determine whether there has been a deliberate departure in the marking, and in a way that it might be used to identify the ballot. Many of the markings in this case are such that the findings of the district court conclude us, because they were purely questions of fact. There was no jury in the case, and the record shows that the rulings were upon the offers of the ballots as evidence; but it appears that the court, in making its rulings, determined the question of fact, and admitted or excluded the ballots, as it found the fact whether they should or should not be counted.

II. It will be well to notice some particular markings and defects that appear. In one ballot the voter wrote the name of a person for supervisor below the printed  
5 ticket, on the margin of the ballot. That it was deliberately done, and that it could be used to identify the ballot, there could be no doubt. The court properly rejected it.

III. On some of the ballots the county ticket was printed in blank; that is, the names of the candidates were not printed in, but the official names appeared, as "For Auditor," "For Treasurer," etc., with a blank space for writing in the names of the persons voted for. In some cases the voter would put a cross in the square, but write in no name, and hence the cross in the square was without apparent  
6 purpose, and could have no use except to identify the ballot. Such ballots were excluded, and properly so.

IV. What are known as Exhibits 8 and 12, being opposition votes for the office of sheriff, are in question; No. 12 having been counted and No. 8 rejected. No. 8 has a cross in the circle at the head of the Democratic ticket.

7 The cross is sufficiently accurate. The voter has also drawn a line from the top of the perpendicular line

of the cross downward to the horizontal line, at an angle of about 30 degrees. It also appears that the voter placed a cross in the circle opposite the People's ticket, and then with thumb or finger, attempted to rub it out, leaving a dirty spot much larger than the circle, and faint tracings of the cross in the circle remain. On ballot No. 12 it appears that the voter expressed his choice of candidates by marking  
8 in the squares, and the votes were for the Republican candidates except three, where the marks were in the squares opposite the names on the Democratic ticket, one of those being Sheean for representative. Carpenter was the Republican candidate, and opposite his name, and covering the square, and extending below it, is a dirty spot, as if made by rubbing with the thumb or finger, but it is much less pronounced than the spot on No. 8, and there is not the slightest indication of a cross having been made in the square. In fact, it may be doubted how the spot came there. On No. 8 there is no doubt, and it is admitted, that it was made in an attempt to rub out the cross in the circle. The facts, as we state them, differ somewhat from the facts as stated by  
9 contestant, his reference being to the abstract, and ours to the original ballots. We do not think there was error in either respect. Where the question of fact is in doubt, we should not disturb the finding of the court below.

V. A voter indicated his choice by marking in the squares. Several of his markings do no more than have one line barely cross the other, so as to leave it somewhat in doubt if it really is a cross. In one of the squares the lines  
10 just meet; that is, one line just reaches the other, so that it is not a cross. Not being a cross, it is an unauthorized mark, and does not indicate a choice or vote for the particular candidate. It was for neither of the candidates who are parties here, and the question is, should the ballot have been excluded? Looking to the markings on the ballot, one is led to think there was no deliberate depar-



ture from the prescribed markings, but a mere accidental or careless departure. However, the doubts leave the question as one of fact for the trial court. This ballot is but one of a number of which similar complaint is made.

VI. On one of the ballots the Democratic ticket was printed with the township ticket at the bottom in blank; that is, the office to be filled was designated as "For Constable," "For Trustee," etc. The voter expressed his choice of candidates by marking in the squares only. He gave his votes for Democratic candidates, except that he voted for incumbent for sheriff. In the blank space for trustee he wrote a name,

and, by the express provisions of the law, to vote for  
11 the person whose name he wrote, he must place a  
cross in the square opposite the name. Code, section  
1119. This he did not do, and hence the writing of the name  
was a deliberate act, and could surely be used for identifica-

tion. The ballot was counted, when it should have been  
rejected. Another ballot for contestant was excluded where  
the voter wrote below the Republican ticket, on the  
12 margin of the ballot, a name for constable. There  
was no cross to indicate a vote for the person, and the  
choice had been expressed as to the others by marking the  
squares. The difference in the two cases is that in one case  
the name was written in the printed ticket, but not voted,  
while in the other it was written below the printed ticket, and  
not voted. The ballot was properly rejected. It is proper to

state here that the law does not recognize the writing  
13 of a name on a ballot except by inserting it in the  
ballot in the proper place. Code, section 1119.

VII. These considerations are sufficient to enable us  
to reach a conclusion as to the case. In doing so, we have felt  
obliged to take each ballot, coming within the range of the  
errors assigned, and, guided by the rules we have suggested,  
so far as applicable, we have determined each particular  
question. Errors have appeared as to both parties, and the  
ultimate question is whether or not, on the whole case, the

judgment should be reversed because of prejudicial error. Of course, errors as to the admission of ballots in evidence that would not affect the result would not be prejudicial. This has led us, after reaching a conclusion on each assignment of error, to determine how the case or result is affected, in view of all the rulings. Our conclusion does not change the result, but would slightly increase the majority for the incumbent over that found by the district court. In any event, the result is close. Were we to determine questions of fact in cases where it is doubtful whether the

14 unauthorized markings were deliberate, and might be used to identify the ballot, which we hold is the province of the district court, the result might and might not be different. The case has been argued somewhat as if that was our province.

VIII. There is a motion by appellant to dismiss the appeal by incumbent on the ground that it is an action at law, and no appeal is permissible, except from a final judgment or order, and no judgment has been rendered against incumbent. Other grounds of the motion present the same legal proposition. The question presented is this:

15 Where a judgment is entered for one party, and the other party appeals, may the party in whose favor the judgment is,—if there are ruling against him on a trial which, if erroneous, would show erroneous rulings in his favor to be without prejudice, and thus preserve his judgment,—by a cross appeal or otherwise, present and have such questions considered? We think it not necessary to consider the question of his right to appeal. In *Bank v. Wright*, 84 Iowa, 728, where the party in whose favor the judgment was did not appeal, and presented no assignment of error, but, on appeal by the other party, urged that the district court erred by its ruling in favor of the appellant, because of which appellant was not prejudiced by the errors for which we reversed the case, we at first said the point could not be considered, because the party urging the error had not appealed.

On an application for a rehearing, we changed the holding, and held that, without an appeal or an assignment of error, appellee might protect a judgment in its favor, if entitled thereto on the face of the record, by showing from the record that the errors of which appellant complained were without prejudice. The incumbent is strictly within that rule in this case, and was entitled to have the questions urged by him considered, regardless of the appeal. The judgment will stand **AFFIRMED**.

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**R. M. WELLS v. W. W. ORDWAY, Appellant.**

**Foreclosure: SUBSEQUENT MORTGAGEE: *Extinguishment*.** A subsequent mortgagee purchased the first mortgage, which he foreclosed, and bought the property for the amount of the decree, etc, without making any reference to subsequent mortgages held by him, in foreclosing or selling. He made no attempt to redeem from himself and accepted redemption money on the first mortgage sale. *Held*, that the lien of such mortgages was thereby extinguished, and that a purchaser of the mortgagor's equity of redemption was entitled to their release on payment of the amount due upon the foreclosure decree.

*Appeal from Monona District Court.*—HON. WILLIAM HUTCHINSON, Judge.

FRIDAY, APRIL 7, 1899.

SUIT in equity to quiet title and to have certain mortgages held by defendant canceled and released. Decree for plaintiff, and defendant appeals.—*Affirmed*.

*MacKenzie, Dewey & Jackson* for appellant.

*Chrisman & Chrisman* for appellee.

DEEMER, J.—The facts which are not in dispute are as follows: October 1, 1887, one Isom was the owner of one hundred and twenty acres of land lying in Monona county.

108	86
119	135
119	590
108	86
122	823
108	86
124	206
108	85
1135	86

On that day he executed a mortgage on the premises to one Edward S. Hall to secure a note for the sum of six hundred and fifty dollars. Thereafter Isom sold the land to one Tipton, and Tipton, on the 9th day of January, executed a mortgage upon the same to the defendant, Ordway, to secure a note for the sum of four hundred and sixty dollars. Afterwards, and on the 16th day of April, 1894, Tipton executed a second mortgage upon the premises to Ordway to secure a note for the sum of six hundred and twenty-five dollars. These last two mortgages were duly filed for record within a few days after their execution. Some time prior to October, 1895, Hall sold and transferred his note and mortgage to Ordway, and Ordway brought suit upon the note and to foreclose the Hall mortgage at the October, 1895, term of the district court of Monona county. No mention was made in his petition of the two other notes and mortgages held by him upon the land. He obtained a decree in his foreclosure suit on the 27th day of December, 1895, and the premises were sold to Ordway under the decree for the amount of the judgment, interest and costs. On December 21, 1896, Tipton sold the premises to the plaintiff, Wells, for the sum of twenty-five hundred dollars, and executed to Wells a warranty deed with covenants against all incumbrances save the judgment and decree rendered in the foreclosure proceedings. On the 24th day of December, 1896, Wells redeemed the lands from the foreclosure sale by paying the clerk of the district court of Monona county the exact amount of the judgment in the foreclosure case, interest and costs, and taking the clerk's certificate therefor. Defendant, Ordway, accepted the redemption money from the clerk, and plaintiff is now in possession of the land. After the redemption, plaintiff tendered to defendant the sum of one dollar and twenty-five cents, and demanded a quitclaim deed for the premises and a release of the two mortgages executed to him by Tipton. Defendant refused to comply with the request, and this suit followed.

Defendant contends that the two mortgages executed to him by Tipton are liens upon the land, and the plaintiff is not entitled to a release of the same; while, on the other hand, plaintiff insists that as defendant was the owner of all the mortgages when he commenced his foreclosure proceedings, and as he did not include them in his foreclosure proceedings, and did not, as a junior creditor, redeem from the foreclosure sale, his two mortgages executed by Tipton are released and satisfied by operation of law. Now, while it is no doubt true that foreclosure of a mortgage may be had for installments due, and the cause continued, on plaintiff's application, for the maturity of subsequent installments (see *McDowell v. Lloyd*, 22 Iowa, 448; *Burroughs v. Ellis*, 76 Iowa, 649), yet that course was not adopted in this case. The court was neither asked to retain jurisdiction of the case in order that the subsequent mortgage might be foreclosed, nor was any mention made of them, either in the petition or in the decree granted by the court. The suit was simply to foreclose the Hall mortgage, and the decree ordered the sale of the premises to satisfy the same. After the sale, Ordway did nothing to protect the liens held by him under the Tipton mortgages. On the contrary, he accepted the redemption money without protest, evidently in the belief that the Tipton mortgages were still liens upon the land. In the case of *Bank v. Percival*, 61 Iowa, 183, and *Stephens v. Mitchell*, 103 Iowa, 65, we held that a creditor may redeem from himself. We are not to be understood as holding, however, that Ordway had such a right in this case. Attention is called to the matter simply to show that he did not attempt its exercise. What, then, are Ordway's rights in the premises? We have frequently held that, unless the court retains jurisdiction of the case to provide for future installments, a sale of the mortgaged premises under foreclosure passes to the purchaser all the title and interest of the mortgagor and mortgagee in and to the premises, and that the purchaser takes free from the lien of the unpaid installments. *Escher v. Simmons*,

54 Iowa, 269; *Poweshiek County v. Dennison*, 36 Iowa, 244; *Harms v. Palmer*, 61 Iowa, 483; *Hardin v. White*, 63 Iowa, 633. So where a mortgage is foreclosed for one installment of the debt, and during the period of redemption the mortgagor conveyed the property to a third person, agreeing to redeem, and afterwards did redeem, it was held that such third person took the property free from the lien of the mortgage as to the balance. *Micklewait v. Raines*, 58 Iowa, 605. See, also, *Escher v. Simmons*, 54 Iowa, 296; *Todd v. Davey*, 60 Iowa, 532; and *Blake v. Black*, 55 Iowa, 252. But it is contended that these rules do not apply to a case where the mortgagee holds separate notes and mortgages. We do not see that this fact in any manner affects the principle to be applied. If the two Tipton mortgages had been held by a stranger to the Hall mortgage, and this stranger had been made a party to the proceedings, there is no doubt that such stranger's right would be lost after his statutory right of redemption expired. On what theory, may we ask, does Ordway have any greater rights than such stranger? He was a party to the suit. He owned the Tipton notes and mortgages at the time the action was commenced, and held them at the time plaintiff made a redemption, yet he did nothing to protect them, and seemed content to accept the money paid by way of redemption. In order to protect himself, Ordway should have asked the foreclosure of all his mortgages, or, if he did not see fit to take this course, he should have bid all that he thought the land was worth, and applied the excess over and above the amount of the judgment on the Hall notes to the satisfaction of his other notes. He may, perhaps, have had the right to redeem from himself; but in no event should he be allowed to speculate upon his debtor's necessities. *Harms v. Palmer*, *supra*; *Escher v. Simmons*, *supra*; *Dickinson v. White*, 64 Iowa, 708. In the case of *Moody v. Funk*, 82 Iowa, 1, which was in principle quite like the case at bar, we said: "But there is a marked difference between the case of a redemption by the judgment

debtor and that of a redemption by his grantee. It is the policy of the law to secure to the debtor, as nearly as is practicable, the full value of his property sold on execution. If the execution creditor failed to bid, for the land sold, a just amount, the debtor should be permitted to transfer his interest to another for a fair consideration; and, if his grantee redeems, the execution creditor has no right to complain, for he might have bid for the land a larger sum. Nor is a junior lienholder prejudiced by such a transfer. It does not affect his right to redeem within the time given him by law, and, if he is not willing to give more for the land than the amount for which it was sold, he should not prevent the debtor from realizing what he can for his property." *Harms v. Palmer*, 73 Iowa, 446, is quite like the case at bar and in it we find this language: "If it was impracticable for the judgment debtor to avail himself of the right on account of the balance of the mortgage debt due by judgment against him, his only resource was to sell his right of redemption for what he could get. The defendant has no reason to complain that he is not allowed to follow the land. He should have bid at the execution sale until the property brought its full value. This court has persistently refused, as will be seen by the later decisions respecting judgment creditors' rights after execution sale, to lend itself to any scheme to sacrifice the judgment debtor's property." See, also, *Bevans v. Dewey*, 82 Iowa, 85; and *Kilmer v. Gallaher*, 107 Iowa, 676. We are clearly of opinion that defendant's lien by reason of the Tipton mortgage is lost, and that the trial court was right in granting to plaintiff the relief demanded. The case of *Spurgin v. Adamson*, 62 Iowa, 661, relied upon by appellant, is not in point. In that case plaintiff did not own all the mortgages at the time he commenced his foreclosure suit. He acquired an independent lien after bidding in the property at a sale under his mortgages. Neither does *Stephens v. Mitchell*, 103 Iowa, 65, announce a rule at variance with what we have said. In that case Stephens bought the sheriff's

certificate issued under the foreclosure sale of a mortgage in which he had no interest, and subsequently bought a second mortgage, which he proceeded to foreclose. It was held that redemption from the first sale did not affect the second foreclosure.

The doctrine of merger does not apply to this case. If it did, we would be inclined to hold there was no merger of the Tipton mortgages. The only questions relate to the effect of a foreclosure for a part of defendant's claims, and a redemption from the sale thereunder. The decree of the district court is **AFFIRMED**.

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ANGELINE WILLIAMS, Appellant, v. EDWIN J. WILLIAMS  
*et al.*

108	91
120	250
121	239
108	91
139	162

**Resulting Trust.** A father about to move his family west, sent one of his sons to look up a location, and he, with the proceeds of the sale of the father's farm in the east, purchased a farm, taking the title in the name of himself and another brother. The family then settled on the farm, working it jointly. Two of the daughters, on their marriage, removed therefrom, and the brother who purchased it, also left it, first making a conveyance to the brother in whose name, jointly with himself, he had taken the conveyance, for a nominal consideration. This brother thereafter conveyed to an unmarried sister, and she, being in failing health, conveyed back to the brother who had purchased the lands. This brother thereafter conveyed part of the tract to his wife. No consideration was paid for any of the conveyances, and two sisters, who never married, resided on the land until their death, and, with the exception of the brother purchasing the farm the other brothers resided thereon until they became unable to work it. *Held*, that, on purchasing the lands with the money furnished by his father and taking the title in himself and brother, a trust resulted in favor of all the children, subject to which the wife took, it being within the saving clause of Code 1873, section 1984, requiring declarations of trust in relation to real estate except trusts resulting from the operations of law, to be executed in the same manner as deeds.

**Secondary Evidence: ADMISSIBILITY.** Evidence that witness did not remember when he last saw a contract, and that he could not tell whether it was at home or elsewhere, or whether another person had it, was insufficient to authorize the admission of parol evidence of the contents of such contract.



*Appeal from Clinton District Court.*—HON. P. B. WOLFE,  
Judge.

FRIDAY, APRIL 7, 1899.

PLAINTIFF, claiming to be the owner in fee simple under a warranty deed from her husband, H. L. Williams, of a certain 80-acre tract of land in Clinton county, Iowa, brings this action to quiet her title thereto as against the defendants, and to recover rent for the years 1893 and 1894. The defendants answered, denying that plaintiff is the owner of said land or entitled to rents as claimed. Further answering, they make allegations, as will hereafter appear, upon which they claim that the title to said land was held in trust by the said H. L. Williams, for himself and for his brothers and sisters, the defendants and their heirs, and that plaintiff knew that fact when she accepted said deed from her husband, and that no consideration was paid by the plaintiff for said conveyance. They ask judgment establishing the rights and interests of the parties in said land. Plaintiff replied, and, after hearing upon the issues joined, decree was rendered apportioning the land among all the parties, and from this decree the plaintiff appeals.—*Affirmed.*

*Barker & McCoy* for appellant.

*Ellis & Ellis* for appellees.

GIVEN, J.—We find the following facts to be fairly established by the evidence: Prior to 1854, Mr. Williams, Sr., now deceased, owned a farm in Vermont, which was sold in contemplation of the family removing to the West. The family then consisted of the father, three sons, Edwin, Henry, and Darwin, and four daughters, Harriet, Parthenia, Emily, and Phoebe. Henry came West to look for  
1 a location for the family, and purchased six 80-acre tracts,—three in Cedar county and three in Clinton

county, including the one in question,—and thirty-two acres of timber land. He took the title in his name and that of Edwin. This land was paid for with the proceeds derived from the sale of the Vermont farm, excepting one 80 in Cedar county, which, being school land, was purchased on long time, and paid for out of the proceeds derived from the cultivation of the farm. In the fall of 1854 the family came to Iowa, erected a house on one of the 80-acre tracts in Cedar county, and thereafter lived thereon, each member of the family aiding in improving all of said lands and using the same as one farm. They continued to live together as a family until 1857, when Emily married a Mr. Alden, and went to live elsewhere. Henry married the plaintiff in 1859, and in 1861 he left the farm, and went to live elsewhere. Phoebe married a Mr. Ordway in 1870, and went elsewhere to live. Harriet and Parthenia remained unmarried, and continued to reside on the farm, up to the time they died. Edwin and Darwin remained unmarried, and continued to live on the farm until 1893, when, being unable to work it themselves, they rented it, and with their sister Mrs. Ordway rented a house elsewhere, in which they have since lived. Mr. Alden died intestate in 1889, leaving Emily, his widow, and Alton G., Hattie, Mary, Emma, and Edith, his children, surviving him, all of whom are of age and parties to this action. On February 9, 1861, about the time Henry left the farm, he and his wife, the plaintiff, conveyed the land, by warranty deed, for the recited consideration of one dollar, to Edwin. This deed was evidently made to place the land under the care of Edwin, who, with Darwin, Parthenia, and Harriet, remained on the farm. On the 10th day of April, 1867, Edwin, being in feeble health, conveyed the land to Parthenia, by a warranty deed, for the recited consideration of six hundred dollars. On September 15, 1882, Parthenia, then in failing health, conveyed the land to Henry, by warranty deed, for the recited consideration of one thousand eight hundred

dollars. On July 4, 1889, while in poor health, and but a few days prior to his death, Henry executed said warranty deed to his wife, the plaintiff, for the recited consideration of one hundred dollars. It is entirely clear that no consideration whatever was paid for any of these conveyances, and that, excepting the one to the plaintiff, each was made for the purpose of allowing the grantee to hold the title in trust. The plaintiff testifies: "I had agreed to let them have the rent as long as Edwin stayed on the premises and paid the taxes. I had agreed to that with my husband. When the deed was given to me by him, he told me that." Mrs. Emily Alden testifies: "Darwin was not exactly of sound mind. He couldn't talk plain, so that many people could understand what he said. He never was of sound mind." As to Edwin she says: "Edwin, I think, is now far from being of sound mind. He has a very poor memory and weak mind. I mean he was not of a very sound mind,—not capable of attending to business."

2 Edwin was examined for the defendants, and, on cross-examination, stated to the effect that his father had deeded the Vermont farm to him and Henry; that there was a contract signed that they should see that the girls and brother had their support out of it. He says: "I can't tell whether that contract is home among the papers or elsewhere. They would be supported their life,—all the support they needed. I had a written notice or paper that we got to come up to that mark. I can't tell whether it is in the papers at home or whether Alden had it. I don't remember when I seen it last." There is no other evidence of the existence of such a contract, and, clearly, this evidence as to its contents is inadmissible, inasmuch as it is not shown that the contract itself could not have been produced if it did exist.

Appellant insist that the trust, if any, rests upon the deed from Parthenia to Henry, and that, as it is a warranty deed for full value, it creates an estoppel as to Parthenia

and Edwin and their heirs. That a trust arose there can be no doubt, and it is clear that it arose upon the execution of the deed from the former owner to Henry and Edwin, and rests upon that deed. The purchase, except as to the school eighty, was with money set apart for the benefit of the seven children, and all the subsequent conveyances, except possibly that to the plaintiff, were made with knowledge of and with that fact in view. Section 1934 of the Code of 1873 is as follows: "Declarations, or creations of trusts or powers, in relation to real estate, must be executed in the same manner as deeds of conveyances; but this provision does not apply to trusts resulting from the operation or construction of law." Appellant insists that this trust comes within these provisions; but not so, we think, for there is no competent evidence of a "declaration or creation" of a trust or power in relation to this land. Trusts resulting from the operation or construction of law are divided into two classes: "*First*, those which are said to result by operation or presumption of law from certain acts or relations of parties, from which an intention to create a trust is supposed to exist, and which are called 'resulting' or 'presumptive' trust; *second*, those which exist by construction of law alone, without any actual or supposed intention that a trust should be created, but merely to assert the rights of parties or baffle fraud." *Dunn v. Zwilling*, 94 Iowa, 234. It is further said in that case: "Resulting trusts may arise—*First*, when the purchaser pays the purchase price, but takes the title in the name of another; *second*, where a trustee or other fiduciary buys property in his own name, but with trust funds; *third*, where the trusts of a conveyance are not declared, or are only partially declared, or fail; and, *fourth*, where a conveyance is made without any consideration, and it appears from the circumstances that the grantee was not intended to take beneficially." The facts of this case bring it clearly within the rule that where the trustee, or other fiduciary, buys property in his own name, but with trust

funds, a resulting trust arises. See *Cotton v. Wood*, 25 Iowa, 44; *Hagan v. Powers*, 103 Iowa, 594. Appellant cites *McGinness v. Barton*, 71 Iowa, 644; *Brown v. Barngrover*, 82 Iowa, 204, and other cases, wherein it was held that the facts established an express trust, and were within the provisions of said section 1934. The facts in those cases were entirely different from the facts in this, and they are therefore not in point. We conclude that the facts of this case clearly bring it within the rules of law "as to trusts resulting from the operation or construction of law."

Some question is made as to the correctness of the apportionment made by the decree. We think it is correct, not only as to the finding of the trust, but as to the interests of the respective parties, and it is therefore AFFIRMED.

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I. M. REDDINGTON, Appellant, v. THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.

**Master and Servant:** OPERATION OF RAILWAY: *Fellow servant*. An injury received by a brakeman, while assisting in coaling an engine, through the negligence of a co-employee in operating the hoisting crane so as to knock him from the platform, such movement of the crane not being necessary in order to permit the train to start, "is not an injury in any manner connected with the use and operation of any railroad," within the meaning of Code 1873, section 1307.

*Appeal from Cerro Gordo District Court.*—JOHN C. SHERWIN, Judge.

THURSDAY, APRIL 7, 1899.

THIS case is before us for further consideration, a rehearing having been granted. It is an action to recover for personal injuries sustained by plaintiff when in the employment of defendant as head brakeman on a freight train. Plaintiff alleges that said injuries were caused by the neglect of one Anderson, a co-employee, while he and the

108 96  
115 405  
108 96  
130 583  
1130 590

plaintiff were engaged in coaling the engine that drew the train upon which plaintiff was employed as brakeman. Defendant answered, denying generally, and alleging contributory negligence on the part of the plaintiff. At the close of the evidence for plaintiff, the defendant moved for a verdict upon several grounds, which, in effect, are as follows: That it does not appear that plaintiff and any co-employee of his were handling railroad machinery moved on railroad tracks at the time of his injury; that it does not appear that plaintiff was at the time of his injury exposed to the hazards or dangers incident to the use and operation of the railroad, nor that he was injured by any wrongful act in any manner connected with the use and operation of a railroad; that it does not appear that plaintiff was free from negligence contributing to his injury, but it does appear that he was guilty of such negligence. This motion was sustained, and a verdict and judgment rendered for the defendant. Plaintiff appealed.—*Affirmed.*

*S. P. Mills, Smith & Pollans, Stanberry & Clarke, and Sullivan & Longley* for appellant.

*J. C. Cook and Blythe, Markley & Smith* for appellee.

GIVEN, J.—I. The facts shown by the evidence necessary to be noticed are these: On and for some time prior to November 1, 1894, the plaintiff was in the employment of the defendant as head brakeman on a freight train, and on that day was so employed on a train running west from North McGregor to Mason City. Defendant had at different stations, including the station of Monona, coal sheds from which to supply its engines, at each of which one or two men, known as "coal heavers," were employed to have the coal ready, and to put the same on the engines, or to assist in doing so. Where there was but one coal heaver employed at a shed, as was the case at Monona, it was the duty of the head brakeman to assist him in coaling the engine draw-

ing the train on which the brakeman worked. At Monona, the coal was put into large iron buckets, and placed in position on an elevated platform by means of a derrick, with a windlass, preparatory to the coming of engines for coal. In coaling an engine at Monona, the coal heaver stood on the ground at the foot of the derrick, and worked the windlass so as to raise and lower the buckets, and assist in swinging them to and from the engine, by turning the derrick. It was the duty of the head brakeman, in assisting in coaling the engine of his train at Monona, to go upon the elevated platform, to give signals to the man at the windlass when to hoist and lower the buckets; to hook the derrick chain to a full bucket, give a signal to hoist it, and, when sufficiently lifted, to aid in swinging it around over the tender; to open the spring that holds the bottom of the bucket; to replace the bottom when the bucket was emptied; and to aid in swinging it around to the place on the platform. It was while thus employed that plaintiff was injured. He had hold with both hands of an empty bucket that had been lifted above his head, and was walking backward, with his head under the bucket, pulling it towards him, for the purpose of swinging it into place. Without signal from him, the bucket was lowered so as to strike him and knock him off the platform to the ground, about eight feet below, by reason of which he was injured. At the time this occurred, the engine and train were standing still; the engineer being on the ground, oiling the engine, and the fireman engaged in drawing clinkers from the firebox. The negligence charged is that, while plaintiff was so employed, "the said Anderson negligently and recklessly let loose of said crank, which he was then managing for the purpose of raising and lowering said bucket, while said bucket was being moved back to said coal shed after the same had been unloaded, without any notice or warning whatsoever that he intended so to do."

II. Section 1307 of the Code of 1873, under which this action is brought, is as follows: "Every corporation

operating a railway shall be liable for all damages sustained by any person, including employees of such corporation, in consequence of the neglect of agents, or by any mismanagement of the engineers or other employes of the corporation, and in consequence of the willful wrongs, whether of commission or of omission, of such agents, engineers, or other employees, when such wrongs are in any manner connected with the use and operation of any railway on or about which they shall be employed, and no contract which restricts such liability shall be legal or binding." This section, as originally enacted, and as amended, has been frequently construed by this court. These various decisions were carefully reviewed in the recent case of *Akeson v. Railroad Co.*, 106 Iowa, 54; and, adhering to the law as therein announced, we proceed to a further consideration of this case. We said in *Akeson's Case* as follows: "The only dangers peculiar to railroading are those occasioned by the movement of the engines, cars, and machinery on the track, or directly connected therewith. It is evident that the statute contemplates such injuries only as are caused by the negligent acts of employees so engaged. In no other proper sense is a railroad used and operated. The peculiarity of the railroad business, which distinguishes it from any other, is the movement of vehicles or machinery of great weight on the tracks by steam or other power; and the dangers incident to such movement are those the statute was intended to guard against. If, then, the injury is received by an employee whose work exposes him to the hazards of moving trains, cars, engines, or machinery on the track, and is caused by the negligence of a co-employee in the actual movement thereof, or in any manner directly connected therewith, the statute applies, and recovery may be had. Beyond this, the statute affords no protection. The purpose of the lawmakers was evidently not to make men, because employed by railroad companies, favorites of the law, but to afford protection owing to the peculiar hazards of their situation." A rehear-



ing was granted, that we might again, aided by further arguments, consider whether the facts bring this case within said section 1307, as construed in the *Akeson Case*.

III. The plaintiff does not allege or claim that he was injured by the actual movement of machinery on the railroad track, but insists that the handling of the derrick in coaling the engine was "directly connected therewith,"—that is, with the movement of the engine,—and that, therefore, his case comes within the provisions of said section 1307, as construed in *Akeson v. Railroad Co.*, *supra*. In that case Akeson and Forshay were employed to coal engines from coal cars alongside of the engine, by carrying the coal from the car to the tender, in handbarrows, over planks laid from the car to the tender as a footway. They had in this way coaled an engine that had been detached from a passing train and moved into position for that purpose. The coaling having been completed, Forshay remained upon the engine, to go on it to the water tank, where it was to be immediately moved. Plaintiff passed over the plank, onto the coal car, whereupon Forshay, for the purpose of allowing the engine to be immediately moved, shoved the plank onto the car, and in so doing struck and injured the plaintiff. We said: "The very purpose of removing the plank was to enable the engine to move, and if, in doing this, Forshay was negligent, such negligence was so clearly connected with the movement as to come within the terms of the statute. Indeed, it is difficult to conceive of a case where negligence not in the actual movement of an engine is more directly connected therewith." Upon closer investigation, we reach the conclusion that that case is distinguishable in its facts from this. That engine could not be properly moved until the plank was detached from it. Therefore the removal of the plank was not remotely, but immediately connected with the moving of the engine. All that remained to be done to move the engine was to give it steam. Let us suppose that the reverse lever of that engine had been

set to run backward, and it was desired to go forward. The lever would have to be changed before giving the engine steam, yet it would hardly be claimed that changing the lever to the forward movement would not be immediately connected with the movement of the engine. Now, the removal of the plank was just as directly connected with the movement of that engine as would have been the reversing of the lever in the case we have supposed. It is true that this engine could not be moved without coaling, and that the use of the crane was necessary in providing it with coal, but not more necessary than any act that preceded, in the mining of the coal, or in putting it in the shed to be handled by the derrick. The handling of the derrick and of the windlass thereon in this case had no more connection with the movement of the engine than in *Luce v. Railway Co.*, 67 Iowa, 75. In that case the plaintiff was employed in a coal house of the defendant, and while hoisting coal for the purpose of filling the car, or, as the record shows, coaling an engine, a co-employee so negligently managed the crane that it struck the plaintiff's arm and broke it. The court said: "The danger arising from the use of the crane does not appear to have been greater or less by the fact that it was used in loading a railroad car; nor does it appear that the plaintiff while engaged in his duty, was exposed to any danger from the operation of the road,"—citing cases. In *Stroble v. Railway Co.*, 70 Iowa, 555, the plaintiff, with another, was employed to elevate coal to a platform for delivery into the tenders of engines; and, in the performance of their duty, it was necessary to pass up and down stairs or steps which were out of repair, and in consequence of which the plaintiff fell and was injured. It was said: "The coal house and stairs were a part of the contrivances for placing fuel within easy reach of the defendant's locomotives, and employees charged with any duty pertaining thereto had no connection with the use and operation of the railroad which is contemplated by the statute. It is true, there is a remote connection, as there is in the case of

the coal miner, or teamster who hauls the coal, all being employed in work which in the end will supply the coal to the locomotive; but this is not the connection contemplated by the statute." In *Johnson v. Railway Co.*, 43 Minn. 207 (45 N. W. Rep. 156), the plaintiff was a member of a crew of workmen engaged in repairing one of the defendant's bridges, and, in performing the work, it was necessary to leave the draw open; and, through the negligence of another employee, the draw was left unfastened, and was blown shut by the wind, and the plaintiff injured while at work. It was held, under a statute quite similar to ours, that the case was not within the provisions of the act. Appellee's counsel speak of the *Akeson Case* as a "border line case," and appellant's counsel insist that this is another border-line case, on the same side of the line. The distinction between these cases is not as broad as between either case and many others that might be cited, yet sufficiently so to show that the wrong complained of in the one was directly connected with the use and operation of a railroad, while in the other it was not. The writer wishes to add that his view of this case has always been that it is not within the statute. The former opinion was written under the supposition that it followed the *Case of Akeson*, but, upon further investigation, we reached the conclusion that this case is not controlled by that, and that the judgment herein should be AFFIRMED.

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M. M. SEEKEL v. MIRANDA J. WINCH, SETH F. WINCH, H.  
A. WELCH, L. W. FALLON and M. J. FITZGIBBON,  
Appellants.

**Fraudulent Conveyance.** An agreement for future support is insufficient as a consideration to uphold a conveyance, as against the grantor's creditors.

**EVIDENCE: Burden of proof.** The burden is upon the wife to show that after such conveyance to her by her husband, which is attacked by his creditors, he has enough property left to pay their claims.

108 102  
129 319

108 102  
140 385

*Appeal from Harrison District Court.*—HON. G. W. WAKEFIELD, Judge.

FRIDAY, APRIL 7, 1899.

CREDITORS' bill to subject certain real estate, the record title to which is in Miranda J. Winch, L. W. Fallon, R. A. Welch, and M. J. Fitzgibbon, to the payment of a judgment held by plaintiff against Seth F. Winch. The trial court granted the relief asked, and defendants appeal.—*Affirmed.*

*S. H. Cochran* for appellants.

*L. R. Bolter & Sons* for appellee.

DEEMER, J.—January 1, 1888, Seth F. Winch made and executed a promissory note to plaintiff, upon which she obtained judgment in the district court of Harrison county on the twentieth day of April, 1896. In that action a writ of attachment issued, and was levied upon the property in controversy. The court, in rendering the judgment, which was a personal one, ordered that the property levied on be sold under special execution. Prior to May 10, 1892, Seth F. Winch was the owner of the real estate levied upon, and on that day, or when the deed was acknowledged, which was on the nineteenth day of September, 1892, he transferred the same to Mrs. Miranda J. Mitchell (now Winch), for the expressed consideration of five hundred dollars. The deed covered, not only the lots and lands embraced in this suit, but also all notes, mortgages, and other personal property owned by the grantor in this state. This suit is to set aside this deed upon the ground that it was without consideration, and made with intent to hinder, delay, and defraud the creditors of Seth Winch. The defendants, other than the Winches, are said to be purchasers of a part of the property, who obtained their title after the order for sale under special execution. These defendants made no defense. Miranda J. Mitchell and Seth F. Winch were married on May 16, 1892. For four or five

years she had been his housekeeper. On the ninth of May they entered into the following contract: "Omaha, May 9th, 1892. This contract, entered into by and between S. F. Winch, party of the first part, and Miranda J. Mitchell, party of the second part: The said Miranda J. Mitchell agrees to take care of the said Seth F. Winch the remainder of his life, provided the said Miranda J. Mitchell shall outlive the said Seth F. Winch, and I to deed to the said Miranda J. Mitchell such part of my property I now own as I wish her to have for her services for looking after me and my home in my declining years; her to see me safely laid away in my last resting place, should she outlive me. Seth F. Winch, Miranda J. Mitchell." It is claimed the deed in question, which bears date May 10, 1892, was executed pursuant to this contract, and in execution of an agreement for a settlement upon Mrs. Winch after her marriage. It is also claimed that Seth F. Winch had a large amount of property in the states of Rhode Island and Minnesota at the time the deed was executed. Mrs. Winch had no property at the time she married Winch, and the conveyance, if it be sustained, must be based upon the theory that it was, in effect, an antenuptial settlement, or based upon the value of services rendered, and to be rendered in the future, by Mrs. Winch. We do not think the evidence sustains the claim that the property was deeded pursuant to an antenuptial agreement or as an antenuptial settlement. The deed which was actually made goes far beyond the contract which preceded it. Indeed, the contract makes no reference to any contemplated settlement. But, if it be true that the deed was intended as a settlement, we do not think it can be sustained; for the reason that the property conveyed is grossly out of proportion to the station and circumstances of the husband, and, in view of the subsequent disposition he made of his other property, was clearly fraudulent. *Gordon v. Worthley*, 48 Iowa, 429; *Herring v. Wickham*, 29 Grat. 628; *Prewitt v. Wilson*, 103 U. S. 22. If the consideration was support furnished, and to be furnished, by Mrs. Winch,

it was voluntary, in so far as it was founded on future support. *Shaw v. Manchester*, 84 Iowa, 246; *Harris v. Brink*, 100 Iowa, 366, and cases cited. As the conveyance was voluntary, the burden is upon the wife to show that at the time of the conveyance her husband had enough other property to pay the plaintiff's claim. *Baxter v. Hecht*, 98 Iowa, 531; *Tyler v. Budd*, 96 Iowa, 29; *Strong v. Lawrence*, 58 Iowa, 55. This she has failed to do. If there be any evidence to establish property in the husband at the time of the conveyance, it shows that such property, except a small bank deposit, was in another jurisdiction. Plaintiff was not compelled to resort to such property, and, as the evidence satisfies us that the conveyance was in fact fraudulent, the trial court did not err in setting it aside.—AFFIRMED.

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THE RED POLLED CATTLE CLUB OF AMERICA V. THE RED  
POLLED CATTLE CLUB OF AMERICA *et al.*,  
Appellants.

106	105
138	233

**Corporate Name:** RIGHT TO USE. In 1883 certain cattle breeders organized the Red Polled Cattle Club of America, and in 1887 published a herd book which was prepared by one M. as secretary, and copyrighted by him. In 1888 the society incorporated in Illinois under the same name. In 1895 defendant incorporated in Iowa, M. being a member thereof as well as a member of the  
2 corporation in Illinois. In 1890, the Illinois corporation published its first volume of a herd book. M. assigned volumes 1 and 2 of the herd book to the Iowa corporation. *Held*, that the Iowa corporation had no right to take and use a name similar to that already in existence, where it was calculated to deceive the public dealing with it.

**INJUNCTION.** A corporation may protect its corporate name by en-  
joining another corporation subsequently organized from using  
4 the same name in a way to injure the business of the former corporation, where the use of the same name by both corporations is calculated to deceive the public and to injure the former's business, although the latter was not guilty of actual fraud in adopting the same name.

**UNINCORPORATED SOCIETIES.** *Change to corporations.* A corporation organized under the name by which a former voluntary club was

8 known, upon the unanimous vote of all the members of such club voting upon the question, although some of them did not vote, succeeds to any right the club may have had to the use of such name.

**Interrogatories:** PRACTICE. Defendant is properly refused permission to propound interrogatories to the plaintiff where the  
1 answer to which they are attached is not filed until too late to obtain the answers before the time set for trial and many of the interrogatories are so unimportant that answers to them should not be required.

*Appeal from Jackson District Court.*—HON. C. M. WATERMAN, Judge.

FRIDAY, APRIL 7, 1899.

THE following are facts conceded or found in this case: That the plaintiff is a corporation organized under the laws of the state of Illinois, and the defendant is a corporation organized under the laws of Iowa; that in 1883 various breeders of red polled cattle formed or acted together as a society or club in the interest of that breed of cattle, and called themselves the Red Polled Cattle Club of America, the society being unincorporated; that there was no such thing as stock, or any different interest than that of each alike paying an equal amount,—five dollars,—based on the idea of meeting expenses; that on November 20, 1893, some fifteen of these breeders met in Chicago, informally organized the so-called Red Polled Cattle Club of America, appointed committees to report a standard for this breed of cattle in America and to report a constitution and by-laws, and at the same meeting adopted reports from these committees so doing, and elected officers; that by 1889, when the regular organization published its second volume of the herd book, there were some seventy-five members acting with it; that at the second annual meeting, in November, 1884, it was decided to publish a herd book, and the labor of publishing it was intrusted to L. F. Ross, who was elected president, and J. C. Murray, who was elected secretary, and which was done entirely by Murray; that in 1887 volume 1 of the American Red Polled Herd

Book was published by J. C. Murray, and copyrighted by him, which contained, in addition to the register of cattle, the information usual in a first volume of such a book, that in 1888 the unincorporated society did incorporate in the state of Illinois under the name of the Red Polled Cattle Club of America; that in 1895 the defendant became incorporated under the laws of Iowa, the defendant Murray being a member thereof, he having also been a member of the unincorporated society in Illinois, and, as we find, a member of the corporation in that state; that in 1890 the plaintiff corporation published its first volume of a herd book, and has since continued its publication; that the plaintiff corporation succeeded to the rights and benefits of the unincorporated society from which it was organized; that defendant Murray, in editing and publishing two volumes of the herd book while a member of the unincorporated society, did so as its secretary and editor; that, while he copyrighted said books in his own name, he had no right thereto; that the defendant corporation took the identical name of the plaintiff corporation, and is pursuing the same aims and purposes, and it is charged by plaintiff that it is with a purpose to defraud and injure it in its business; that the defendant Murray, for the purpose of injuring plaintiff, has made a pretended assignment of volumes 1 and 2 of herd book to the defendant corporation, and relief by way of injunction, and otherwise, is asked. Upon the issues joined, a trial was had in the district court, that gave judgment for plaintiff, from which the defendants appealed.—*Affirmed.*

*Hayes & Schuyler* for appellants.

*Davison & Lane* and *Preston & Moffit* for appellee.

GRANGER, J.—I. Annexed to the answers were filed 67 interrogatories to be answered by the plaintiff. To the interrogatories from 1 to 64, the plaintiff filed exceptions and objections, and a ground thereof was that the questions were



frivolous, unimportant, and incompetent to elicit material evidence; and by the exceptions it was further made to appear that some of the officers and members of the plaintiff corporation, having knowledge of the facts, resided in Michigan, Ohio, and Wisconsin, and that it would be impracticable to obtain full and explicit answers to the interrogations that were material, prior to the trial of the cause, when such officers and members as had such

knowledge would be present, and could be used  
 1 on the trial to show the facts. The answer to which the interrogatories were attached was filed April 24, 1896, and it appears from the record that the cause was submitted to the court on the thirtieth of the same month. The interrogatories must have been filed when the case was expected to proceed to trial, and when, if it did so proceed, the answers could not be made before trial. It is true that many of the interrogatories are unimportant, and answers to them should not have been required. Under the holding of *Hogaboom v. Price*, 53 Iowa, 703, the ruling was right on this particular ground. We may refer in this connection to a complaint based on a refusal by the court to strike certain averments from the reply. Whatever may be said as to the technical correctness of such averments in the reply, the issues were in no way changed because of them, as the same facts had before been pleaded and become material under issues otherwise joined.

II. The legal contention is over the right of the defendant corporation to use the name "Red Polled Cattle Club of America." That it has such a right, if in the exercise of it there is not an infringement of the rights of plaintiff, no one doubts. Much importance seems to be attached to the legal status of the unincorporated society known as Red Polled Cattle Club of America—to whose rights and inter-  
 2 ests, under our findings, the plaintiff corporation succeeded—both before and after the plaintiff became incorporated. By noting some facts, confusion may be avoided, because, as to the facts, there is some dispute. The

voluntary association, prior to November, 1888, when plaintiff incorporated, was made up of a membership with chosen officers, and one purpose of the society was collecting material for, and publishing, a herd book in the interest of its membership. In all respects it was purely voluntary, and it does not appear that it was for pecuniary profit. It was so organized that its officers were chosen and its business was directed by the society, and J. C. Murray, a defendant in this suit, was its secretary and treasurer, and as its secretary, and by its direction, he edited and published two volumes of the herd book. As to the particulars of their publication there is some dispute, it being appellants' theory that Murray did it at his own expense, and that the publication copyrighted in his name was his. Our finding is that at the meeting of the club in November, 1888, when the club, by what we call "unanimous consent," decided to incorporate, Murray was not the owner of the book, any more than any other member of the club was, and that the incorporation of the plaintiff dissolved the prior organization because of the unanimous assent thereto, expressly or tacitly given, and the purpose to make the incorporation of plaintiff succeed to all its rights and properties. Because of the individual assent to this result, we think all questions of what might have been individual rights of members of the club when unincorporated, or what was its legal status, is not involved here. The voluntary society club, with no vote against it, adopted a resolution to incorporate. While all did not vote for it, none voted against it, and, in pursuance of the adoption of the resolution, its purpose was carried out by an incorporation without objection and with the full purpose clearly known. It is because

3 of these facts that we say the incorporation was formed by the unanimous assent of the membership of the voluntary society. It is not important to consider the right of the voluntary society to the name it bore, from a legal point of view. In the change of its organization from that of a voluntary to an incorporated club, the name was lost to

the former and adopted by the latter, and exclusively used by it till 1895, when the defendant corporation came into existence.

This leaves but the question of the right of the defendant to adopt and use the name owned and used by the plaintiff. The district court prepared and filed a statement of its views on the different questions involved, in harmony with what we have said, and, as we concur with that court on the remaining question, we may well adopt the views expressed by it, as follows:

“(3) What right has plaintiff to restrain or restrict defendants in the use of said name? The defendants, having legally incorporated in Iowa, certainly have a right to their corporate name, except in so far as they may injure plaintiff by so doing. Whether the name in question is of a character to properly constitute a trade-mark or trade-name, I need not consider. When defendant chose it, they did so with full knowledge of the fact that plaintiff had already adopted it and was doing business under it. That the name is of a pecuniary value is sufficiently shown by the facts that defendants selected it, though free to take any name they chose, and now make such strenuous efforts to continue its use. Conceding, for argument's sake, that the corporated name of plaintiff is not a lawful trade-mark, yet, if defendants adopted it with intent to take business from plaintiff, and thus do it injury,—and which I find to be the fact in this case,—the law will interfere to prevent the accomplishment of any such purpose. The rule seems to be this: Irrespective of any question of trade-marks, manufacturers have no right by imitative devices, to beguile the public into buying their wares, under the impression that they are buying those of their rivals, nor has a corporation a right to take and use a name so similar to that of another already in existence as to be calculated to deceive the public dealing with it. From among the numerous cases on the subject, I select the following: *Coats v. Thread Co.*, 149 U. S. 562 (13 Sup. Ct. Rep.

966); *McLean v. Fleming*, 96 U. S. 245; *Holmes, Booth & Haydens v. Holmes, Booth & Atwood Mfg. Co.*, 37 Conn. 278; *Thread Co. v. Armitage*, 67 Fed. Rep. 896; *Higgins Co. v. Higgins Soap Co.*, 144 N. Y. 462 (39 N. E. Rep. 490); *Croft v. Day*, 7 Beav. 84. In *Holmes, Booth & Haydens v. Holmes, Booth & Atwood Mfg. Co.*, *supra*, it is said, in substance: Actual fraud need not be shown. It is enough if the name of the alleged infringer is calculated to deceive. In the case at bar, names are identical. It is true the plaintiff company has for some time past used the word 'incorporated' in connection with its name; but this word is no part of its legal title, and, if it was, while its use might destroy the identity of the two names, it would not deprive them of their deceptive similarity. It is a descriptive word only, and is equally so to both organizations. Outside of these considerations, however, defendants are in no position to insist that plaintiff company must distinguish itself from the corporation they have formed.

If possible, as I have already said, for the Iowa corporation to use its name in any way not injurious to the business of plaintiff, it is entitled to do so, but, inasmuch as the names are exactly the same, it seems obvious that such use  
 4 can be made only in matters purely formal. Plaintiff is entitled to relief by injunction. The judgment should be broad enough to be protective. An entry may be drawn prohibiting the defendants, their servants, etc., from publishing or issuing any herd book under the name, or purporting to be published by the authority of the Red Polled Cattle Club of America, or from representing or holding said corporation out to the public as the Red Polled Cattle Club of America.

See, also, as sustaining these conclusions, *Lodge v. Graham*, 96 Iowa, 592.

III. It is said the plaintiff is not entitled to equitable relief because of its laches, because the separation was in 1888, and defendants have continued business right along

and were not disturbed until 1895. The facts are not quite in harmony with the statement. It is true that Murray, and perhaps others with him, not as a corporation, had been pursuing the business; but the incorporation came in 1895, and a principal fact of contention is the right to own and publish the herd book, the third volume of which, as edited by Murray, is now in process of publication, to prevent which this suit is in part instituted. The judgment is **AFFIRMED**.

WATERMAN, J., takes no part.

108 112  
131 443

### JENNIE W. HEATON V. GEORGE W. AINLEY.

**Contract on Back of Note.** An agreement written on the back of a  
1 note is a part thereof.

**CONSTRUCTION** Where a wife executed a note, stipulating that it was given to secure the payee against loss he might sustain by  
3 reason of any account, indorsement, or signing of any notes or other papers of the husband, and the husband was then indebted for a balance on account, the note secures such account, though, through inadvertence, the name of the husband is not, in terms, repeated in the writing.

**Sureties: PRESUMPTIONS.** Where it does not appear when a surety  
4 took up the note, it may be presumed that he did so at maturity.

**APPLICATION OF PAYMENTS.** Where a surety pays the note, but the maker, having no knowledge thereof, gives a new note to the  
5 surety, with the understanding that it is in lieu of the former, and is to be discounted at a bank, and the proceeds applied to the former, payments made by the maker of the second note should be applied on the first one.

**SAME.** Where a husband's creditor knowingly receives the proceeds  
6 of the sale of lots mortgaged by the wife to secure the debt, he must apply them on the mortgage.

**SAME.** A creditor receiving a payment without instructions may  
7 apply it on any claim he chooses.

**Judicial Notice.** The court takes judicial notice that "acct" stands  
2 for "account."

*Appeal from Dallas District Court.*—HON. JOHN A. STORY,  
Judge.

108 112  
138 481

FRIDAY, APRIL 7, 1899.

ACTION for an accounting of money received on certain mortgages, and praying for their cancellation. The defendant Ainley asked for judgment for the amount due, and decree of foreclosure. The district court found a balance of six hundred and twenty-one dollars and forty cents owing Ainley, and entered a decree accordingly. Ainley appeals.—*Modified and affirmed.*

*Read & Read* for appellant.

*Shortley & Harpel* and *White & Clark* for appellees.

LADD, J.—On the tenth day of May, 1889, the plaintiff executed to the defendant Ainley a note of one thousand dollars, and a mortgage, securing its payment, on forty-two lots in Perry; and on the same day she and the defendant Heaton, her husband, executed a note for a like amount, and a mortgage, securing it, on fourteen lots belonging to him, which have since been conveyed to her. The last note was given to indemnify Ainley against any loss he might sustain by reason of indorsing or signing notes with Heaton. That this was also the purpose of executing the first note is not questioned, but something more is claimed for it. When delivered, this

was written on the back: "It is hereby agreed that  
1 this note is not transferable, and that it is given,  
together with the mortgage securing the same, only  
for the purpose of securing C. H. Ainley against any and all  
loss the said Ainley sustains by reason of any acct, indorsement or signing of any notes, bonds, or other papers." This was as much a part of the note as though incorporated in the body of it. *Elmore v. Higgins*, 20 Iowa, 250; *State v. Stratton*, 27 Iowa, 420; *Oskaloosa College v. Hickok*, 46 Iowa, 287. That the abbreviation "acct" stands for "account," admits of no doubt. It has been in common use in commercial transactions for so long that the memory of man runneth

not to the contrary, and its meaning is as well understood as though the word had been written out. It is given as  
2 an abbreviation in common use by the lexicographers,  
and the courts will certainly take notice of that which every one else knows. See authorities collected in 1 Enc. Pl. & Prac. 42, and 1 Am. & Eng. Enc. Law, 97. There was then a balance of several hundred dollars due Ainley on account, and, in view of this fact, the meaning of the writing is not doubtful. The loss contemplated was evidently (1) that which might be sustained by reason of existing account; and (2) that which might result to him as indorser or surety. The plain language employed answers the contention of the  
appellees that indemnity to Ainley as surety only was  
3 intended. That liabilities of Heaton were referred to fully appears from the evidence and surrounding circumstances, and is not questioned by the appellees. Doubtless, the words "of George Heaton" were inadvertently omitted from the writing, and we shall proceed as though they were annexed thereto.

II. Ainley was surety on two notes for one thousand six hundred dollars executed by Heaton to Joseph Ainley, and payable August 11, 1889. Whether these in fact belonged to Joseph, or this was the method taken by Ainley to obtain them for himself, we need not determine. That he represented Joseph, and furnished the money to take up other obligations, and Heaton so understood, are not disputed. In  
some way the notes were obtained, or taken up, but  
4 how or when is not disclosed. In the absence of any showing, we may well presume this to have been done at their maturity. Ainley paid a balance of one thousand and twenty dollars and sixty-five cents on the notes to Chandler, Brown & Co., September 30, 1889. This was unknown to Heaton, who executed another note to Ainley, with the understanding that it should be indorsed to the Commercial Bank, and funds obtained to liquidate them. Ainley simply indorsed this note, and left it with the bank for collection.

It requires no further attention, except as indicating the application which should be made of certain payments. Heaton paid the bank one hundred and forty-nine dollars and fifty cents on August 8, 1890; and on the nineteenth day of December, 1892, \$290, derived from a certain mortgage given Ainley to secure this note, was left there  
5 to be applied thereon. As Ainley represented the note to have been given in lieu of those to Chandler, Brown & Co., and Heaton so believed, these payments should be applied on that debt. Ainley also received one thousand one hundred and ninety-seven dollars and fifty cents from the proceeds of a grain elevator sold by Heaton on the thirteenth day of February, 1893.

III. Several of the lots owned by plaintiff, on which the first mortgage mentioned was executed to Ainley, were sold, and the money and securities derived therefrom turned over to him. He was fully advised that these came from the sale of such lots. It was her understanding that the proceeds of any lot sold should be applied in liquidation of this mortgage, and Heaton had no authority to use these for any other  
6 purpose. Without direction, then, Ainley was bound to apply them on her obligation. It is argued that the lots in fact belong to Heaton, and had been fraudulently transferred to his wife. She acquired the property long before the indebtedness was incurred, and without the purpose of defeating any of his creditors, present or future. It follows that the sums received from the sale of lots must be applied on the plaintiff's mortgage,—that is, two hundred dollars received from Rall October 30, 1894; two hundred dollars received from Mrs. Alpaugh February 15, 1895; two hundred and fifty dollars received from White June 1, 1895; and four hundred and eighty dollars received from Mann August 3, 1895. By so doing there appears to be a balance of two hundred and nine dollars and seventy-five cents June 1, 1895. At that time more than this amount was due from Heaton on account, after allowing all proper



credits; and, as the plaintiff's note and mortgage were given in part to secure this, we think Ainley entitled to judgment for this balance, with interest at the rate of six per cent. per annum from June 1, 1895, and a decree foreclosing the mortgage.

IV. But these payments have simply been applied to reduce the obligation of the plaintiff given to indemnify Ainley against loss on account or as surety of Heaton, and it remains to determine on what indebtedness of his they should be credited. The Mann notes for four hundred and eighty dollars were delivered to Ainley August 5, 1889, and by him credited on his general account with Heaton. The appellees say that these should be so applied as to reduce the plaintiff's obligation. This is true, as we have seen, but that does not aid in determining on what debt of Heaton the credit should be entered. Ainley says he and Heaton agreed it should be on the account, while the latter denies

this, but does not claim that any instructions were  
7 given. In the absence of any direction, Ainley had the right to place the credit on any indebtedness he might choose. The proceeds of the other lots are to be applied on sums heretofore mentioned as having been paid out by Ainley. After allowing Heaton all proper credits, and Ainley interest at the rate of six per cent. per annum on moneys paid out, there was due on the latter on June 1, 1895, the sum of one thousand and ninety-three dollars and sixty-one cents. Judgment will be rendered for this amount, with interest at the rate of six per cent. per annum from that date, and decree entered foreclosing the mortgage executed on the fourteen lots of Heaton. One-half of the costs of this court will be taxed to each party—Modified and AFFIRMED.

108	117
d109	448
108	117
128	434

SARAH T. PARKER V. THE DES MOINES LIFE ASSOCIATION,  
Appellant.

**Insurance:** SUICIDE. The suicide of insured, not in pursuance of a preconceived intent existing when the policy was taken out, does not, in the absence of a provision for forfeiture in such case, constitute a defense as against the beneficiary named in the policy, and the fact that the company was organized under chapter 65, Twenty-first General Assembly and, therefore, the assured had a right with the permission of the company to change the beneficiary without the original beneficiary's consent does not change the rule, the policy benefit being taken by contract and not inheritance, and no change of beneficiary having been made.

**SAME:** A secret intent on the part of insured at the time of taking out a policy on his life to commit suicide, vitiates the policy even as against the beneficiary named therein although there is no provision for forfeiture in case of suicide.

**Pleading:** SETTING OUT INSURANCE APPLICATION. Under Acts Eighteenth, General Assembly chapter 211, section 2, providing that insurer cannot, in an action on a policy, plead or prove the application therefor, unless it be attached to the policy, an answer, in an action on a policy, setting up fraud in the application therefor, is insufficient unless it shows that the application was attached to the policy.

**JUDGMENT UPON.** Where the answer, in an action on a policy, contains a general denial and a denial of plaintiff's ownership, it is error to summarily enter judgment upon the pleadings, without proof of plaintiff's claim.

**DENIAL:** *Construction of.* An answer in an application on a life policy does not deny the death of assured by merely denying that he died on the day stated in the complaint, his death being admitted in other portions of the answer.

**Appeal:** REPLEADING: *Waiver.* By repleading matter in answer after it has been stricken, defendant does not waive exceptions to the ruling in striking such matter, even if the exceptions to the ruling on the new answer are not available on appeal from the first ruling, but can present the exceptions to the ruling on appeal from the final judgment.

**FILING ABSTRACT:** *Dismissal.* After argument on the merits, an appeal will not be dismissed, as of course, because of failure to file the abstract within the time fixed by the rules.

NOTICE OF: *Sufficiency* A notice of appeal which notifies the plaintiffs that defendant appeals from the "rulings and judgments" of the district court rendered on certain specified dates is  
2 sufficient to admit of appellant presenting its exception to the final judgment although such judgment was not rendered at either of the dates specified, where one of the dates is a mistake, no ruling or judgment appearing to have been made or rendered on that date.

*Appeal from Clinton District Court.*—HON. P. B. WOLFE,  
Judge.

SATURDAY, APRIL 8, 1899.

ACTION upon a policy of life insurance. There was a judgment in plaintiff's favor. Defendant appeals.—*Reversed.*

*A. H. Evans and Carr & Parker* for appellant.

*Frank P. McGinn* for appellee.

WATERMAN, J.—The petition states a cause of action upon a policy of insurance issued by defendant company upon the life of one Henry Parker, and payable, in the event of loss, to plaintiff. Defendant answered, setting up various defenses in different paragraphs or divisions of its pleading. The first paragraph contained a general denial, except as to admissions specially made; the second, an admission of defendant's corporate capacity; the third, a denial, upon information and belief, of Parker's death "on the 11th day of November, 1895," and of plaintiff's ownership of the policy. The fourth division of the answer sets up the falsity of certain answers made by Parker to questions contained in the application for such insurance. Division 5 contains a charge that Parker's death was caused by his own willful and voluntary act; and in division 6 it is averred that Parker applied for and procured the policy in suit with the fraudulent intent to commit suicide. Later, this answer was amended by adding an allegation that defendant company

was incorporated as a mutual benefit association, under Acts Twenty-first General Assembly, chapter 65. Plaintiff filed a motion to strike out all of the fourth, fifth, and sixth divisions of the answer, upon the following grounds: "All of the fourth, fifth, and sixth paragraphs,—that is to say, all that portion of defendant's answer beginning with the first word in the first line on the second page of said answer and ending with the word 'void' in the fifteenth line of the sixth paragraph on the fourth page of said answer,—and also the application attached to said answer, which is made a part thereof: (1) All the averments and allegations in said fourth paragraph constitute a pleading or pleadings based upon a written application alleged to have been signed by the said insured and given to said company, in consideration and upon the faith of which the policy sued upon in this action was issued to said Henry Parker, and that neither said application, nor a copy thereof, was ever attached to said policy nor indorsed thereon. (2) All the averments and allegations in the fifth paragraph of defendant's answer are immaterial, irrelevant, incompetent, and constitute no defense, nor any part of a defense to plaintiff's petition. (3) That all the averments and allegations in the sixth paragraph of said answer are immaterial, irrelevant, incompetent, argumentative, and matters of evidence. (4) That the application, a copy of which is attached to said answer, nor a copy thereof, is not now, and never was, attached to said policy nor indorsed thereon. (5) Plaintiff specially moves that the following be stricken out of defendant's amended and substituted answer, viz.: All of that portion of said answer beginning with the word 'are,' in the twenty-second line of the fourth paragraph of the second page, and ending with the word 'no,' in the second line of the third page of said answer, for the reason that the same is immaterial, irrelevant, redundant, and matter of evidence." The last ground refers to the answers given by Parker in his application for the policy. By agreement this motion was to stand both as a motion and a

demurrer. It was sustained by the court, and defendant's exception to the ruling was duly entered. Thereafter, substantially the same pleading was filed as a second amended and substituted answer. The only practical difference is that it contains the matter set up in the amendment to the first answer, in which it is averred that it is a mutual benefit association, doing business "[as provided in chapter 65 of the Acts of the 21st General Assembly of the State of Iowa]". This answer was attacked by motion to strike similar to the motion already set out, except that it also asks to have stricken the language which we have enclosed in brackets, and also the application attached to the answer, and, as an additional ground, charges that the matter set up is the same as was formerly pleaded. This motion was sustained as to divisions 5 and 6, which were the same as in the original answer, defendant excepting. Plaintiff then demurred to the fourth division, which is identical with the fourth paragraph of the original answer, and the demurrer was sustained, defendant again preserving its exception. Defendant refusing to plead further, judgment was rendered in plaintiff's favor for the amount claimed.

II. It is first urged by appellant that there was enough remaining in the answer, after the motion and demurree were sustained, to put plaintiff on proof of her claim, and that it was therefore error to render judgment in her  
1 favor. Appellant claims that the answer contains a denial of Parker's death, but to this we cannot assent. The third paragraph, to which reference is made, merely denies that Parker died on November 11, 1895. In other divisions of the same pleading his death is admitted. There was, however, remaining in the answer, a denial that plaintiff was the owner of the policy sued upon. It is insisted by appellee that the record is such that defendant is not  
2 entitled to make this point, for no appeal was taken from the judgment. The notice of appeal, omitting the caption, is as follows: "To Said plaintiff and

her Attorney F. P. McGinn, and J. H. Edens, Clerk of Said Court: You, and each of you, are hereby notified that said defendant hereby appeals from the rulings and judgments of the district court rendered on the 24th day of September, 1896, the 16th day of December, 1896, and the 28th day of April, 1897, respectively, to the supreme court of the state of Iowa. Dated, Clinton, Iowa, May 8, 1897. A. H. Evans, L. A. Ellis, and F. W. Ellis, Attys. for Defendant." On September 24, 1896, the order was made sustaining the first motion. December 16th the second motion was sustained in part, as we have stated. We find no order or judgment of date April 28, 1897. The demurrer was sustained, and judgment awarded, on the sixth of April, and the entry thereof was made on May 8th. Appellee claims that this does not show an appeal from the judgment. Notwithstanding the discrepancy in the dates, we think the notice sufficient to admit of appellant presenting here its exception to the judgment. *Kennedy v. Rosier*, 71 Iowa, 671. It

3 was error for the trial court to summarily enter judgment, as though no pleading was on file for defendant, with defendant's general denial, and special denial of plaintiff's interest in the policy, still standing.

III. Appellee contends that, by pleading over after the ruling on the first motion, defendant has waived its right to be heard on the exceptions then taken, and, as we understand, it is also claimed there is no ground for complaint of the court's action on the amended and substituted answer, as that was but a re-pleading of matter which had been formerly stricken, and it was proper, on that ground, to strike the pleading from the files. But we are by no means sure that the court so treated this answer. It is true that in sustaining the motion the court said that divisions 5 and 6 were stricken, "on the ground that they were the same paragraphs which were stricken by Judge House." But he at the same time overruled the motion as to the fourth division, which was identical with the fourth

division of the original answer, to which the first motion to strike was also sustained. However this may be, if the second answer was, in its fourth, fifth, and sixth divisions, but a re-pleading of matter which had before been stricken, it would not constitute a waiver by defendant of its exception to the rulings on the first motion, and the questions raised by the attack on each of these pleadings are the same. Defendant was not obliged to appeal directly from the ruling on the first motion, but was entitled to proceed to judgment, and present its exceptions to the intermediate orders, on appeal from the final result. *Jones v. Railroad Co.*, 36 Iowa, 68.

IV. It is insisted by appellant that, as it does not affirmatively appear in the answer that a copy of the application was not indorsed upon, or attached to, the policy, as required by section 2, chapter 211, Acts Eighteenth General Assembly, it was error to sustain the demurrer to the defense set up in the fourth division. The thought seems to be that the burden was on plaintiff to show that this statute was not complied with. This section, after requiring insurance companies to indorse upon, or attach to, each policy the application made therefor, says, "The omission so to do shall not render the policy invalid, but if any company or association neglects to comply with the requirements of this section, it shall forever be precluded from pleading, alleging or proving such application or representations or any part thereof

\* \* \* in any action on such policy \* \* \*

5 The indorsement of a copy of the application upon the policy, or its attachment thereto, being thus made a necessary foundation for pleading the falsity of statements made therein, it follows that defendant must supply this basis by an allegation that the requirements of this statute have been complied with. This not being done in the answer, the demurrer was properly sustained.

V. The fifth division of the answer sets up as a defense the suicide of the assured. In the case of *Seiler v. Associa-*

tion, 105 Iowa, 87, we held that the suicide of the assured would not operate to avoid the policy as against a beneficiary named therein, where, as here, the policy contained no provision of forfeiture in such case. It is sought to distinguish that case from the one at bar, on the ground that the defendant here is an assessment company organized under chapter 65, Acts Twenty-first General Assembly, and that the assured had a right, under the law, with the permission of the company, to change the beneficiary without the latter's consent. We are not able to see that this distinction alters the principle announced in the *Seiler Case*. This policy was made payable to plaintiff. It does not appear that any change of beneficiaries was ever made. Upon Parker's death, plaintiff took by contract, and not by inheritance from the assured. This view has support in *Patterson v. Insurance Co.*, 100 Wis. 118 (75 N. W. Rep. 980), where a similar question was passed upon, and in which the court says: "Such a beneficiary has an actual subsisting interest in the policy, subject to the right of the insured who has paid the premiums to vest it elsewhere; but, until such action by the assured, the interest of the beneficiary is such a vested, subsisting interest as would pass to the administrator of the beneficiary in case of his death. Such being the case, it falls directly within the principle of the New York and Minnesota cases [there referred to], which hold that, as against such a beneficiary, suicide is not a defense, in the absence of a provision in the policy." The principle upon which we rested the decision in the *Seiler Case* controls here. Plaintiff's interest was acquired by contract. The fact that it could have been divested by the assured does not matter, for that was not done. This case, as well as the *Seiler Case*, is to be distinguished from *Ritter v. Insurance Co.*, 169 U. S. 139 (18 Sup. Ct. Rep. 300), relied upon by defendant. We need not repeat what is said on this subject in the *Seiler Case*, but we avail ourselves of the opportunity to add to the authorities there cited,



in support of the conclusion reached, not only the Wisconsin case from which we have quoted, but also *Morris v. Assurance Co.*, 183 Pa. St. 563 (39 Atl. Rep. 52). Both of these cases appeared after the opinion in the *Seiler Case* was filed. The motion to strike this division of the answer was properly sustained.

VI. The sixth division of the answer set up fraud on the part of Parker in procuring the policy. It was alleged that he secured the same with the intent at the time to commit suicide. It needs no argument to show that a  
 7 secret intent of this kind would amount to a fraud; and, as fraud vitiates all contracts, this defense, if established, would defeat a recovery on the policy. Being void in its inception, no rights would accrue under the contract to any person. *Patterson v. Insurance Co.*, *supra*.

VII. Appellee's motion to dismiss the appeal is not well taken. What we have already said will indicate, in part, our reasons for this ruling. We only need add that the  
 8 assignments of error are sufficiently specific, and that, after argument on its merits, an appeal will not be dismissed, as a matter of course, because the abstract of record is not filed within the time fixed by the rules of this court. For the reasons assigned the judgment will be  
 REVERSED.

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G. W. CULLISON v. EDMUND LINDSAY and GEORGE S. RAINBOW, Appellants.

**Attorney and Client: WITHDRAWAL OF ATTORNEY.** Where a client, after suit has been brought, denies liability for fees, unless  
 3 successful, the attorney may withdraw, if his remaining is not necessary to a successful conduct of the suit.

**SAME: Burden of proof.** Where an attorney withdraws from a suit, it cannot be presumed, in the absence of evidence, that the subse-  
 3 quent adverse result to his client was due to his withdrawal.

**AUTHORITY.** An attorney is not authorized, on his own motion, to  
 4 commence affirmative proceedings to keep alive a judgment which he has for collection.

**CONTRACT:** *Jury question.* Replevin being brought against a judgment creditor and a levying officer, the attorney for the former employed another attorney, who, with knowledge of both defendants, conducted the defense. In a suit against such defendants by the second attorney, for services, the evidence as to whether  
9 the first attorney held the judgment to collect on a contingent fee basis, and with no authority to employ assistance, was conflicting, the second testifying that the creditor admitted that the first attorney had such authority. There was evidence that the officer had requested the second attorney to take part in the case. *Held*, that the issue of an agreement by defendants to pay the second attorney for his services was for the jury.

**Charge and Proof:** **FRAUD.** Under an instruction that recovery is authorized where an attorney necessitated a transcript by putting  
5 into an abstract filed by him, statements as to evidence which he knows to be false, the attorney is not liable for putting in such evidence recklessly while having reasonable ground to believe that the statements are untrue.

**SAME.** *Negligence of an attorney.* In an action by an attorney for services, the jury entered a general verdict in his favor, and found specially that he was negligent in certain matters, as claimed by the client. The court had instructed that if plaintiff was acting  
6 under the directions of another attorney, who had sole control of the case, he would not be liable for negligence. *Held*, that the special finding was not inconsistent with the general verdict.

**Evidence:** **HARMLESS ERROR.** In a suit by an attorney for services, in rendering which the client claimed he had been negligent, the  
7 erroneous admission of evidence for the attorney on the issue of negligence was harmless, where the jury found against him thereon.

**SAME.** Where a fact is shown in evidence without conflict, error in  
7 excluding further evidence thereof is harmless.

**OFFER FOR SPECIAL PURPOSE:** *Contradiction.* Where the transcript of testimony given by a witness in one case is introduced in another, the jury may compare the testimony therein with that  
8 given by the witness in the second case, though the transcript was introduced merely to show what the witness "said on a given issue" and not to show that his testimony in the transcript was truthful.

**Appeal:** **REVIEW:** *Judgment non obstante.* By moving for judgment notwithstanding a general verdict, on the ground that the special findings are inconsistent therewith, a party does not waive his right to complain, on appeal, of other errors.

**NOTICE OF APPEAL:** *Clerk and deputy.* A notice of appeal may be served on a deputy clerk, though the clerk, who is not present, is  
1 accessible at the time,

*Appeal from Shelby District Court.*—HON. W. R. GREEN,  
Judge.

SATURDAY, APRIL 8, 1899.

PLAINTIFF'S action was to recover attorney's fees. Each of the defendants interposed a general denial, and the defendant Lindsay set up a counterclaim, the details of which will be set out hereafter. There was a trial to jury. Verdict and judgment for plaintiff. Both parties appeal.—*Affirmed.*

*B. I. Salinger* for appellants.

*D. O. Stuart, T. H. Smith, and G. W. Cullison* for appellee.

WATERMAN, J.—The appeal of defendants having been first perfected, they will be denominated "appellants."

Plaintiff insists that Lindsay's appeal is not properly in this court, because the notice thereof was served on the deputy clerk, when the clerk was accessible at the  
1 time. It is not claimed, however, that the clerk was present when the deputy was served. In any event, the service was sufficient. *Sanxey v. Glass Co.*, 68 Iowa, 542; *Manufacturing Co. v. Sterrett*, 94 Iowa, 158.

II. In order to convey an understanding of the points involved, it is necessary that we make a somewhat extended statement of the issues presented by the counterclaim, which consists of charges of negligence and misconduct on plaintiff's part in the matters for which he is claiming compensation: Lindsay was the owner of a judgment against one John Gollobitch, of Shelby county, which he placed in the hands of Warren Gammon, an attorney, for collection. At this time the other defendant, Rainbow, was sheriff of Shelby county. Acting under instructions, said sheriff levied an execution issued upon this judgment on certain personal property, as belonging to the debtor. Rosina Gollobitch, the

debtor's wife, made claim to the property seized, and brought replevin therefor. At this juncture, through the instrumentality of Gammon, plaintiff came into the case as attorney for Lindsay and the sheriff, and he took part in, or, as defendants claim, conducted, the trial. It was plaintiff's plan, in the trial, to meet the claim of Mrs. Gollobitch to ownership of the property with the charge that the same had been fraudulently conveyed to her by the judgment debtor. This case was tried, resulting in a disagreement of the jury. There was a second trial, but, before it came on, Mrs. Gollobitch filed a reply to the answer of defendant in replevin, pleading therein that the statute of limitations barred any claim of fraud. The first charge of negligence is that plaintiff went to trial in the face of this plea, when he knew, or should have known, that he could not successfully meet it. On the second trial, as the charge is made, plaintiff, over the objection of opposing counsel, had a deputy sheriff impanel the jury, and serve notice to take a deposition of one Nurre, that was intended for use in the case on behalf of his clients, and that he caused answers to certain interrogatories attached to a pleading on behalf of Mrs. Gollobitch to be answered by Gammon, instead of by the defendant in replevin, to whom they were addressed. This trial ended favorably for Rainbow. Mrs. Gollobitch appealed. The case was reversed on appeal because the jury had been so impaneled, the deposition so taken, and the interrogatories answered as stated. It is further charged that on this appeal, although the appellant filed a full and fair abstract, the plaintiff filed on the part of appellee an additional abstract, which was recklessly false in its statements of the testimony; that it contained a denial of the correctness of appellant's abstract, thus requiring appellant to file a complete transcript of the evidence, at a cost of three hundred and fifty dollars, which amount, with the other costs, was taxed against defendant Rainbow on the reversal of the case, and defendant Lindsay, having indemnified said Rainbow, has been compelled to pay the same; that

plaintiff made no argument in this case, nor did anything after filing the additional abstract. It is not disputed but that the costs of the second trial of the replevin case were four hundred and seventy-five dollars and twenty-five cents, and the total costs in this court on appeal of that case were seven hundred and eleven dollars and twenty-five cents. Another claim is that plaintiff did not re-take the Nurre deposition for use in the replevin case, which was tried a third time, with the result that these defendants were defeated. It is further charged against plaintiff that, as attorney for Lindsay, he began an action in equity to subject to the payment of the judgment mentioned certain real estate which stood in the name of Rosina Gollobitch, but which it was claimed had been conveyed to her by the judgment debtor in order to defraud his creditor. And it is said that, before the trial of that action, plaintiff refused to proceed in that matter, and withdrew from the cause, which was thereafter tried, and Lindsay was defeated, and that plaintiff negligently permitted said judgment to become barred by limitation. This is an outline of the charges made in the counterclaim. The details, so far as necessary, will be given as we consider the different issues, as will also the defenses which plaintiff claims thereto.

III. On the trial below, the jury in the case at bar returned a general verdict for plaintiff, and made certain special findings. Defendants claim that these findings, or some of them, were inconsistent with the general verdict, and made a motion for judgment in their favor *non obstante veredicto*. Plaintiff now insists that by this motion defendants have waived their right to complain of any other errors. This is not the law. See *Hooker v. Chittenden*, 106 Iowa, 321; *Pieart v. Railway Co.*, 82 Iowa, 148.

IV. The court took from the jury the following matters set up in the counterclaim: (1) That part relating to the prosecution of the replevin suit after Mrs. Gollobitch

has interposed the plea of the statute of limitations to the charge of fraud; (2) that relating to the failure to re-take the Nurre deposition; (3) the portion involving the charge of plaintiff's failure to prosecute the equity suit brought to subject the land to the payment of Lindsay's judgment, and permitting the judgment to outlaw; (4) the charge that plaintiff made no argument in this court on appeal in the replevin case; (5) the claim for costs on the third trial of the replevin case. The action of the trial court in each of these matters was excepted to, but the ruling on the third item only is argued, and it is with relation to this alone that we shall speak, though we may add that we discover no error in the

other matter. In the effort to collect the judgment  
3 owned by Lindsay, an action in equity was brought, as already said, to subject to its lien a certain tract of land, the title to which stood in the name of the judgment debtor's wife. Plaintiff, we may say for present purposes, had charge of the case as attorney. He learned after a time that Lindsay denied any liability for fees, except in case of success. Plaintiff withdrew from the case. It was afterwards tried by other counsel, and Lindsay was defeated. There is no attempt to show that anything plaintiff could have done would have affected the result. It was not negligence for plaintiff to decline to proceed further, under the circumstances; and we know of no rule authorizing us to presume that the adverse result was owing to his conduct. To

the charge that plaintiff permitted the judgment to  
4 outlaw, it may properly be responded that under the rule announced in *Weiser v. McDowell*, 93 Iowa, 772, the judgment is not barred. Moreover, we do not think plaintiff was required, or even authorized, on his own motion, to put his client to the costs of an affirmative proceeding to keep the judgment alive.

V. The undisputed evidence shows that, on the appeal of the replevin case to this court, plaintiff compelled appellant to file a transcript of the evidence, by denying the con

rectness of her abstract, and setting forth in an additional abstract an untrue statement of what it was said the testimony was in the trial court. The defense to this is that plaintiff was acting under the instructions of Gammon, who had superior charge of the case, that the transcript of the evidence was not obtainable when the additional abstract was

5        prepared, and that the work was done from recollection. The evidence as set out in this additional abstract was in part grossly incorrect. On this branch of the case the trial court instructed that plaintiff would be liable for the costs of the transcript, if he caused it to be filed by incorporating in the abstract for appellee false statements of the evidence, and which were known to him at the time to be false. No error is assigned upon this instruction. Therefore it is the law of the case. Plaintiff's reckless conduct in this regard, or the fact that he may have had reasonable ground to believe or know the untruthfulness of the abstract, are not made elements of the case. The jury was told to find against him on this branch only if it found that he in fact knew the statements to be false. Now plaintiff denies that he had any such knowledge. Whatever we may think on that question, we cannot say the jury had no testimony upon which to base the finding.

VI. As already said, the jury in the case at bar returned both a general and special verdict. They were told by the court that, upon a certain hypothesis, plaintiff might recover one hundred and forty dollars for his services on the second trial of the replevin case. The general verdict was in plaintiff's favor for one hundred and forty dollars, and two interrogatories submitted were answered, as follows: "Was plaintiff guilty of negligence and want of ordinary skill, on the second trial of the replevin case, in respect to impaneling the jury, the Nurre deposition, or the answer to interrogatories? [Answer] Yes." "Do you allow the plaintiff anything for the second trial? [Answer]

6        Yes." It is insisted by appellants that the finding that plaintiff was negligent in the management of

the second trial is inconsistent with the allowance to him of compensation therefor. The court instructed that if plaintiff was negligent, and the result was to cause Lindsay damage to an amount equal to or greater than the compensation due plaintiff, the latter could not recover. But in the fifteenth paragraph of the charge is this qualification: (15) "One exception should be made to the foregoing rules for determining the amount of Lindsay's recovery on his counterclaim, if you find that he is entitled to recover thereon. The plaintiff claims that whatever he did in the replevin case was done at the direction of Gammon, who had sole charge and control thereof. On this point you are instructed that if plaintiff was employed simply to assist Gammon, and acted under his directions in doing what he did, then this will exempt him from liability on account of the matters alleged with reference to the impaneling of the jury, the taking of the deposition, and the answers to the interrogatories; but the burden of proof is upon plaintiff to bring himself within this exception, if you find Lindsay is otherwise entitled to recover." It is said in plaintiff's behalf that the jury may have found that plaintiff acted under the circumstances mentioned in this instruction, and that, although he was negligent, he would be entitled to recover. To this appellants respond that an act so done at Gammon's request would be Gammon's act, and not that of plaintiff, and, if it was a negligent act, the consequences could not properly be attributed to plaintiff. This may be. But no such distinction is made in the instruction. We think the jury may well have believed that, under the assumed facts of this paragraph, the plaintiff might have been negligent without being liable. This holding disposes of appellants' motion for judgment on the special finding.

VII. The next matter urged is that the court erred in permitting the jury to consider the fact that the judge who presided, in the second trial of the replevin case, allowed Rainbow's deputy to impanel the jury, and admitted the interrogatories answered by Gammon, and the deposition of Nurre.



We discover no prejudice in this action, if it was erroneous, for the jury found that these matters constituted negligence in the management of the action, though they exonerated plaintiff from responsibility therefor. We can say

7 the same with relation to a claimed error of the court in striking out the statement of the witness Jones, to the effect that a transcript was filed by appellant in the replevin case in this court. Irrespective of this answer, the evidence of this witness shows that such a transcript was filed, and its cost. The instructions of the court, too, proceed upon the theory that there was evidence of such transcript having been filed. The jury could not have been misled in this respect.

VIII. Defendants introduced a transcript of the evidence given by Gammon as a witness on the trial of the replevin case, and counsel stated at the time he made the offer of this testimony that it was not to show that the witness told the truth, but simply what he "said on a given  
8 issue." Afterwards an instruction was asked by defendants in which the jury were told they should not compare the transcript with what Gammon said as a witness on the trial of the case at bar, and that it made no difference if Gammon's testimony in the transcript was different from that given by him in this case. These instructions were rightly refused. Under the offer, Gammon's testimony in the transcript was properly before the jury, for them to determine what he then said.

IX. Finally it is said there was no evidence of any agreement on the part of defendants to pay plaintiff for his services. We think otherwise. Plaintiff claimed both on an express and an implied contract. The trial  
9 court instructed that there was no evidence of an express contract to pay a fixed fee, but plaintiff introduced testimony to show that the amount claimed was reasonable. There was evidence to show that Rainbow had asked plaintiff to take part in the case, and it is undisputed that

both defendants, during the progress of the litigation, were aware of the fact that he was rendering service. On Lindsay's part it is claimed that Gammon had the judgment for collection on shares, and that he had no authority to make him (Lindsay) liable for anything further than this by employing assistance. It is conceded that it was through Gammon that plaintiff came into the case. The evidence is in conflict as to what the agreement with Gammon was, but there is testimony going to show that Gammon said nothing about a contingent fee, and plaintiff testifies that Lindsay admitted to him that Gammon had authority to employ some person to assist him. These facts, in connection with the knowledge the defendants had of plaintiff's labor at the time he was performing the service, were enough to take this issue to the jury. Had we been trying this case on the facts, we should quite likely have reached a different conclusion from that announced in the verdict; but, under the rules by which we are governed, we see no ground to warrant us in changing the result reached in the trial court.—AFFIRMED.

DEEMER, J., having presided at one of the trials in the district court, and being somewhat acquainted with the facts, takes no part.

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A. A. HAWKS, Plaintiff, v. L. E. FELLOWS, Judge, Defendant.

**Intoxicating Liquors:** CONTEMPT Under Acts Twenty-fifth. General Assembly, chapter 62, section 19, known as the 'Mulct Law,' providing that, when any of the conditions of the act should be

4 violated, persons engaged in the sale of liquors under the act should be liable to the penalties provided by Code 1873, Title 11, chapter 6, and under section 1540 of the latter chapter, making servants employed in the sale of liquors in violation of the chapter subject to the penalties therein provided, one engaged as a bartender in carrying on such a business can be found guilty of contempt in violating an injunction in a decree forbidding the further continuance of the business.

108	133
113	557

108	133
117	550

108	133
144	67

**SAME.** The payment by a saloonkeeper of the tax required by Acts Twenty-fifth General Assembly (Mulct Law) does not relieve his bartender from the charge of contempt of an injunction restraining both of them from selling liquors where prior to the sale in question the conditions of the act had been violated by sales to minors, which violation by section 19 removed the protection afforded by the act, although the sales to the minors were made by the saloonkeeper and not by the bartender.

**INJUNCTION: Service of writ.** Where defendants enjoined were in court by attorney when the decree of injunction was rendered, they are chargeable with the knowledge of its contents; and the decree need not be served upon them, to render them guilty of contempt for violating the same.

**EVIDENCE.** Where in an action to enjoin a liquor nuisance, plaintiff introduces an affidavit of one alleging that he was an employee in defendant's saloon, and that the owner was conducting the place in compliance with the mulct law, plaintiff is bound thereby, so far as it is not shown to be untrue by other evidence.

**CONTEMPT: Review** The Supreme Court may, upon *certiorari* to review an order dismissing an application to punish the violation of an injunction as a contempt, inquire whether the injunction was violated, notwithstanding that the district judge found that a contempt had not been committed.

SATURDAY, APRIL 8, 1899.

PROCEEDING by *certiorari* to review an order of the district court discharging one Henry Severson in a proceeding instituted to punish him for contempt.—*Annulled.*

*E. R. Acres* for plaintiff.

*Dan Shea* and *John B. Kaye* for defendant.

ROBINSON, C. J.—The facts established by the record before us are as follows: In September, 1896, in an action in which the plaintiff in this proceeding was plaintiff and Henry Severson and others were defendants, Henry Severson and A. R. Severson were found to have maintained a nuisance in a building on a lot in the city of Decorah, which was described, in that they kept for sale and sold in the building intoxicating liquors in violation of law. It was therefore “ordered, adjudged, and decreed that a perpetual

injunction issue against the defendants A. R. Severson and Henry Severson, forever restraining them" from selling or keeping for sale in violation of law intoxicating liquors in the premises described, or elsewhere within the Thirteenth judicial district, and restraining the defendants from permitting the premises to be used as a place in which to sell or keep for sale intoxicating liquors in violation of law. No writ of injunction was ever issued by virtue of the decree. In September, 1897, the plaintiff filed in the district court of Winneshiek county an affidavit in which he set out the decree, and alleged that the two Seversons had violated it by maintaining a saloon in the premises described, and by selling therein intoxicating liquors to minors and others. Henry Severson appeared, and filed an affidavit in response to that of the plaintiff, and witnesses were examined, resulting in the discharge of Henry Severson, as stated. The plaintiff asks in this proceeding that the finding of the district court, and its order discharging the accused, be reviewed.

1 That we may review such an order in a proceeding by *certiorari* is settled. See *Lake v. Wolfe*, 108 Iowa, 184. The evidence shows clearly that A. R. Severson, as proprietor, carried on a saloon in the premises enjoined, after the decree was rendered, that there were numerous sales of intoxicating liquors made therein to minors and to others, and that Henry Severson was employed as a bartender in the saloon.

I. It is insisted, however, that the injunction for which the decree provided was not in force, because a writ of injunction had not been issued and served. But the law does not require useless formalities. The defendants enjoined

2 were in court, by attorney, when the decree was rendered, and are chargeable with knowledge of all it contained. They had appeared in the case, and resisted the demands of the plaintiff, and had no rights which the issuing of a formal writ would have subserved. The injunction, as to them, was in force from the time the decree was

rendered. *Milne v. Van Buskirk*, 9 Iowa, 558; *Bartel v. Hobson*, 107 Iowa, 644.

II. The district court found that A. R. Severson maintained and conducted the place in question in compliance with chapter 62 of the Acts of the Twenty-fifth General Assembly, popularly known as the "Mulet Law," and that the tax required by the law had been fully paid. The only evidence to show that the business was carried on in compliance with the act specified is found in the affidavit made by Henry Severson, which contains the following: "I, Henry Severson, being first duly sworn, depose and say that, at the time and times set forth in plaintiff's affidavit, I was an employee in the saloon situated in the premises in question, and that the owner thereof, A. R. Severson, was at such time and times conducting and maintaining a place for the sale of intoxicating liquors therein in compliance with chapter 62, Acts Twenty-fifth General Assembly, Iowa, and acts amendatory thereto." So much of the affidavit as we  
3 have set out, with formal parts, was introduced in evidence by the plaintiff, and he thereby vouched for its credibility; and, although the latter part of it is in the nature of a conclusion, he is bound by it, at least so far as it is not shown to be untrue by other evidence. *Murphy v. McCarthy*, 108 Iowa, 38. It is shown that minors were sometimes found in the saloon, it is not shown that objection was made to their presence, and intoxicating liquors were sold to minors in violation of the act specified. Section 19 of that act provided that, whenever any conditions of the act should be violated, the bar to proceedings for which section 17 provided should cease to operate, and persons engaged in the sale of intoxicating liquors as contemplated by the act should be liable to all the penalties provided by chapter 6 of title 11 of the Code of 1873. *State v. Pressman*, 103 Iowa, 449. The chapter (6) referred to included section 1540, which reads: "All clerks, servants, and agents of whatever kind engaged or employed in the \* \* \* sale

or keeping for sale in violation of this chapter, of any intoxicating liquor, shall be charged and convicted in the same manner as principals may be, and shall be subject to the pains and penalties herein provided." The unlawful acts for which the proprietor of the saloon was responsible removed the bar for which section 17, chapter 62, of the Acts of the Twenty-fifth General Assembly provided, and subjected him and his employes engaged in the business to the penalties of the law. Henry Severson is not shown to have been constantly employed in the business, nor to have made any sales to minors, but that he was engaged, as a bartender, in assisting in carrying on the illegal business during a part of the time in question, and thus violated the injunction for which the decree provided, is clearly shown; and it follows that the district court erred in finding that he was not guilty of a contempt. See *Cotant v. Hobson*, 98 Iowa, 318. The finding of the defendant and the order discharging Henry Severson are annulled, and further action in harmony with this opinion is directed.—ANNULLED.

HANS STOMNE V. THE HANFORD PRODUCE COMPANY, Appellant.

**Master and Servant:** ASSUMING RISK OF EMPLOYMENT: *Jury question.* An employer reversed an elevator cable, and informed his

- 1 employee that the elevator was fit to use, but not to use it for the top floors, unless obliged to do so. While conveying freight to an upper floor, the elevator fell, injuring the employe. *Held*, that whether or not he assumed the risk incident to the defective cable was for the jury.

**SAME.** The essential element of the assumption of a risk by a servant of the danger from the defective cable of an elevator, that he appreciated the danger, cannot as a matter of law, be inferred

- 1 from his knowledge of the defect where he was informed by the superintendent that it was safe enough to use for the rest of the
- 3 season and the latter rode upon the elevator with the servant only the day before the accident.

**SAME.** The doctrine of the assumption of risk involves two elements; 2 knowledge of the defect and appreciation of the danger.

108	137
109	590
108	137
111	351
108	137
116	621
108	137
120	419
108	137
124	52
124	475
108	137
128	264
108	137
129	5
130	209
108	137
131	526
108	137
132	740
133	249
108	137
136	307
108	137
138	382

**Settlement:** JURY QUESTION: *Pleading.* In an action for injuries, defendant pleaded a settlement, to which plaintiff made no reply. Defendant, at the close of the evidence, moved for judgment because such settlement was not denied by the pleadings. *Held*,  
5 that it was properly overruled because the settlement was denied by operation of law and plaintiff's testimony tended to show that it was not made in satisfaction of his right to sue; and hence that there was no settlement.

**SAME.** The issue of compromise and settlement of a servant's claim  
5 against his master for personal injuries is properly submitted to the jury upon conflicting evidence that the payments made to and  
6 retained by the servant were merely on account of wages and expenses attending his injury and were not intended as a settlement of the claim.

**Contributory Negligence:** JURY QUESTION. After a defective elevator cable was reversed, an employe was instructed not to use it for upper floors, unless obliged to do so. A stairway and another  
3 elevator afforded access to the upper floors, but it was customary for employes moving freight to ride on the elevator as it saved  
4 time. In conveying freight to an upper floor, the elevator fell, injuring an employe. *Held*, that the question of his negligence was for the jury.

**Evidence:** LIFE TABLES. Where there was evidence that a servant's  
10 injuries were permanent, life-expectancy tables were properly admitted.

**OPINION EVIDENCE:** *Competency.* A witness who is familiar with wire cables from working about and with them for many years  
7 and has repaired cables on elevators is competent to testify as an expert on the question as to the safety of a partly worn cable on an elevator, although he has never constructed an elevator.

**Plea and Proof.** Evidence that after a master's attention was called to a defect in an appliance he made certain changes and directed  
6 the servant to use it is admissible to avoid the inference of the assumption of risk from knowledge of such defect, although  
8 plaintiff filed no reply confessing the assumption of risk and avoiding the same, since the assuming of the risk pleaded in answer was denied by operation of law, without a reply.

**Damages:** EXCESSIVE VERDICT. Where plaintiff's spine was permanently injured and partial paralysis ensued in an accident caused  
11 by defendant's negligence, and he suffered excruciating pain, which would probably continue, a verdict of \$8,000 was not excessive.

**Instructions:** REVIEWED TOGETHER. The omission of a material issue from a paragraph of a charge wherein the jury are instructed  
9 to find for the plaintiff, if they find in his favor on certain issues,

is not prejudicial, where such issue is fully covered in another part of the charge

**Practice: OBJECTIONS** Where in action for injuries sustained by the falling of an elevator, a finding that defendant was negligent was not challenged, objection to testimony that witness considered the elevator unsafe, if human life was involved, going as it does, to negligence only, is unavailable.

*Appeal from Woodbury District Court.*—HON. F. R. GAYNOR, Judge.

SATURDAY, APRIL 8, 1899.

ACTION to recover for personal injuries caused, as alleged, by the negligence of the defendant. There was a jury trial. Verdict and judgment for plaintiff. Defendant appeals.—*Affirmed*

*Taylor & Burgess* for appellant.

*Wright, Call & Hubbard* for appellee.

WATERMAN, J.—I. Defendant was engaged in the cold storage business at Sioux City, using therefor a building several stories in height. Plaintiff was in its employ as a common laborer. In the building were two elevators used for the purpose of carrying merchandise from floor to floor. The elevators were of equal lifting capacity, though one had a larger platform than the other. They stood quite close together, the larger one being nearer the door through which produce was received into the building. On one occasion, while plaintiff and a co-employee, one Sundloff, were engaged in oiling the wire cable that lifted the larger elevator, Sundloff noticed that the cable was defective in one place. As he says: "I saw one of them twists pretty nearly broken off, and two of them— There is three twists on a cable, and two of them looked to me larger than the other, and as though they kind of give, and the wire around them was kind of broken off, like it had been chopped off with a hatchet." Sundloff called plaintiff's attention to the condition of the cable. Stomne looked at the defect, and then



the two went to the office, and reported what they had seen to Holcomb, who was the superintendent. The two men, in company with Holcomb, returned, and again looked at the cable. Holcomb told them he would report the matter, and a day or two after said to them that the cable would be changed end for end. This was done later. The cable was operated by being wound and unwound from a large drum at the top of the building; from this it passed over a pulley, and down to the elevator to which it was attached. Plaintiff says of the change made: "Before the cable was changed end for end, I think the worn place would come between the elevator and the pulley when the elevator was on the first floor. After the change, the worn place shifted to the other side." After this change, Holcomb said, in effect, to plaintiff, that he thought the elevator was all right until the spring work was over, but that he should not use it to the top floor unless obliged to do so. Shortly after this plaintiff and Sundloff were engaged in storing produce received. Both elevators were idle. They put a truck load of freight upon the large elevator, got upon it themselves, as was customary, and started for one of the upper floors. When near the second floor, the cable parted at the worn or defective place, and in the fall that resulted plaintiff was seriously and permanently injured. Some other facts necessary to an understanding of the points made will be stated in connection with the issues, as we consider them.

II. No question is made as to the finding of negligence on defendant's part. Appellant's first contention is that plaintiff, having knowledge of the defect in the cable, and thereafter using the elevator without complaint or  
1 objection, must be held to have assumed the risk in so doing. The doctrine of assumption of risk involves two elements,—knowledge of the defect and an appreciation of the danger. *Brownfield v. Railway Co.*, 107 Iowa, 254; *Mayes v. Railway Co.*, 63 Iowa, 562; *Worden v. Railway Co.*, 72 Iowa, 201; *Cook*  
2 *v. Railway Co.*, 34 Minn. 45 (24 N. W. Rep. 311); *Russell v. Railway Co.*, 32 Minn.

230 (20 N. W. Rep. 147). It is true that an employe is held to have knowledge of those things which the exercise of ordinary care should reveal, and that there may be conditions or defects so obviously dangerous that his knowledge of them will be held, as matter of law, to impress his mind with the risk arising therefrom. But is this such a case? If we should say that plaintiff knew, or should have known, that the cable was dangerously defective as it was used when he first saw the worn or broken strands, we must then take into consideration what followed. The employer, upon being notified, attempted to put the elevator in condition for use. Plaintiff was then told it was fit for service until the spring work was through; to use it to the lower floors, but not to the top floor, unless it was necessary. The elevator was used thereafter with the knowledge of the defendant, Holcomb riding upon it with plaintiff and Sundloff only the day before the accident. We cannot say, as a matter of law, under these circumstances, that plaintiff knew, or should have known, the risk in going upon this elevator. The most that can be consistently urged in defendant's behalf is that there was evidence to sustain a finding in its favor. But the jury found against it, and the fact is thus settled, so far as our consideration of the case is concerned.

III. It is thought the evidence shows that plaintiff was guilty of contributory negligence. What has just been said will apply on this point also. It was customary for the men moving freight from floor to floor in the warehouse to ride with it on the elevator. There was a stairway, also, that afforded access to the upper floors of the building, but the testimony seems to show that some one had to be on the elevator in order to properly manage it, and it is undisputed that the use of the stairway by the men would have resulted in a loss of time. If plaintiff is not held to the knowledge of danger in using this elevator, there is no warrant for saying he was negligent in not making use of the smaller elevator, which was accessible at that time, or in not

making his ascent on the stairway. As before, we say this was a jury question, and with the finding we cannot interfere.

IV. Next, we come to the issue of compromise and settlement. It is necessary to set out some further facts, in order that the claims of the parties on this branch of the case may be fully understood. Shortly after plaintiff's injury, Hanford, the president of defendant company, and Stough, its vice president, called upon him at his home. As to what transpired, these witnesses testify, in effect, that plaintiff and his wife said they had been advised to bring an action against defendant; that the physician told them Stomne would not be able to return to his work for some three or four months. Hanford made a proposition to settle by paying plaintiff's wages, ten dollars per week, until he was able to return to light work. At the wife's suggestion, Hanford included in this offer the payment for all medicines and

the physician's bill. This offer was accepted, and  
5 plaintiff agreed to bring no action. Plaintiff testifies that he did not agree to accept the proposition as a settlement of his claim; that, while the offer was made on account of his injuries, yet he did not agree that he would not sue; that Hanford said: "When I should be well, if I should then want to go and bring suit against them, I should come to them first." To some extent plaintiff is corroborated by his wife. It is not disputed that, under this arrangement, defendant continued paying plaintiff his wages during a period of one year, amounting to the sum of five hundred and twenty dollars; that it paid for medicines and physician's services, four hundred and five dollars and twenty-five cents; and that plaintiff received and still keeps, the money so paid him. Defendant pleaded this settlement. Plaintiff filed no  
6 reply. At the close of plaintiff's case, and before any evidence had been received as to the settlement, defendant made a motion for a verdict, and, with other grounds stated: "Because the defendant, among

other defenses, pleads accord and satisfaction and settlement, and the same stands undenied in the pleadings." When all the testimony was in, this motion was renewed, with an addition to the effect that the testimony shows an accord and satisfaction, and that, if plaintiff had any right, it is under the agreement as he states it, and not upon the original cause of action. It is now insisted that, inasmuch as plaintiff filed no pleading in avoidance of the settlement set up in the answer, defendant was entitled to a judgment. The plea of settlement was denied by operation of law. Plaintiff's testimony tended to show that the money was neither paid nor received in bar of his right to sue. Under these circumstances, it was open for the jury to find, as it must have done, that there was no settlement, and that the money paid was on account of compensation, but not in full for it. There is no legal reason that we can perceive why, if defendant admitted liability on account of plaintiff's injuries, it could not pay from time to time something on account, leaving the matter of adjusting its complete liability to a future date. There was evidence tending to show that this was what was done. If defendant had admitted the transaction as claimed, but denied that it was valid or effective as a settlement because of fraud or mistake, then a reply setting up such matter in avoidance would have been necessary. *O'Brien v. Railway Co.*, 89 Iowa, 644, and cases cited. But here the fact of settlement is in issue. If our views on this point need the support of authority, we refer to the case of *Higley v. Railway Co.*, 99 Iowa, 503, as somewhat in point. Another claim of appellant is that plaintiff's right of action, if any he has, is upon the agreement made at the time of this alleged settlement, and not upon the original cause. If anything more than what we have said is required to dispose of this claim, it need only be a statement that in plaintiff's version of what occurred on this occasion, while he uses the word "agreed," it is clear that he means no more than that he accepted the offer of payments on account.

V. One Barr was a witness for plaintiff. He was the person who repaired the elevator when the cable was shifted. Several objections are made by defendant to his testimony. He had been familiar with wire cables,—worked about and with them for many years. He had never constructed  
7 an elevator, though he had repaired cables on elevators. He was examined as an expert as to the cable in question. We think his qualification was sufficiently shown. The principal objection urged to his evidence is that he was permitted to say that he did not consider the cable, after it was reversed, safe, if human life was involved. It would be a complete answer to this objection, if there were no other, that the only effect of this testimony was to show negligence on defendant's part, and no question is made on that point in this court.

VI. Paragraph 10 of the court's charge is made the basis of the next exception. It is as follows: "You are further instructed that if you find from the evidence that, prior to the injury, the plaintiff was advised of a defect in the cable, and saw it, and this defect was called to the attention of the defendant, and the defendant assumed to change the cable and remedy the defect, and thereafter directed the plaintiff to continue the use of the elevator, and the plaintiff was induced to believe, by the acts and conduct of the defendant, that said elevator and cable were safe for use, and did so believe, and did not know, and by the exercise of ordinary care could not have known, that the defect in the cable rendered it weak and unsafe for use in the manner in which he was using it at the time of the injury, then he cannot be  
8 held to have assumed the risk consequent upon such defect." It is said that this instruction was not proper, because plaintiff filed no reply confessing the assumption of risk and avoiding the same. But plaintiff, by operation of law, denies that he assumed any risk. We have already said enough on this subject to show the status of the parties on this issue. It is further said by defendant

that there is no warrant in the evidence for the facts stated in this instruction. But we think otherwise.

VII. The fifth instruction affords the next ground of complaint. The jury is told in this paragraph to return a verdict in plaintiff's favor if they find defendant's negligence, freedom from negligence on plaintiff's part, together with his injury, unless the settlement pleaded by defendant is established. The fault found here is that the  
9 issue of assumption of risk is not submitted. But, further on in the charge this issue is fully and fairly stated, and in such a way that we feel the jury could not have been misled. See *Allen v. Railroad Co.*, 57 Iowa, 623.

VIII. The ninth instruction given is also the subject of exception. It is quite lengthy. We will not set it out. Neither shall we go into detail in its consideration. We have carefully considered the complaints lodged against it, and deem them without substantial merit.

IX. It is thought there was error in admitting tables showing plaintiff's expectancy of life, and also in refusing an instruction asked by defendant relating to the subject of future disability. Such tables are admissible when  
10 there is evidence that the injury is permanent, and we think the testimony here is without dispute on that point. *Blair v. Madison County*, 81 Iowa, 313; *Ronn v. City of Des Moines*, 78 Iowa, 63; *Knapp v. Railway Co.*, 71 Iowa, 41; *Keyes v. City of Cedar Falls*, 107 Iowa, 509. As to the instruction, its subject-matter is fully covered in the charge as given.

X. One or two rulings on the admission of testimony remain to be disposed of, and this we shall do by the statement that, if erroneous, they could not have been prejudicial.

XI. Finally the amount of the verdict is made a subject of attack. It was for the sum of eight thousand dollars, —a large sum, indeed, for one of plaintiff's age, business, and station in life, if compensation for his decreased earning

capacity alone was to be considered. But he has suffered  
 excruciating pain. His injury is in part to the spine,  
 11 resulting in partial paralysis. That he will never  
 recover his former condition is testified to by two  
 physicians who were witnesses. At the time of the trial, one  
 year and a half after the accident, he was still suffering pain  
 from his injuries, and no assurance was given by the physi-  
 cians as to when this would cease. While the verdict is large,  
 we cannot say it is excessive.—AFFIRMED.

CO-OPERATIVE SAVINGS AND LOAN ASSOCIATION, Plaintiff  
 and Appellant, v. JOHN KENT and ELIZABETH S. KENT,  
 Defendants and Appellants; and H. G. GRAAF, H. B.  
 EGBERT, S. J. EGBERT, BOLDEN & FURMAN, FIRST  
 NATIONAL BANK OF ESTHERVILLE, A. O. PATTERSON,  
 J. B. GOULD, M. REIGELMAN & Co., and D. B. FISK &  
 Co., Defendants and Appellees; and A. W. DAWSON,  
 Intervener and Appellee.

**Redemption: ESTOPPEL: Mortgages.** One taking a deed from the  
 mortgagor of the premises after the first mortgage had been fore-  
 closed, and redeeming from the foreclosure sale, is not estopped.  
 by a recital in her deed that the conveyance is subject to a second  
 mortgage, to allege the subsequent extinguishment of such second  
 mortgage by failure of the holder thereof to redeem from the sale  
 in the foreclosure suit, to which suit he was a party.

*Appeal from Emmet District Court.*—HON. W. B. QUAR-  
 TON, Judge.

SATURDAY, APRIL 8, 1899.

SUIT in equity to foreclose a mortgage upon certain lots  
 in the town of Estherville. The trial court rendered judg-  
 ment for the amount of certain notes executed by the defend-  
 ant Kent, but denied the prayer for foreclosure of the mort-  
 gage. Plaintiff and the Kents appeal.—*Affirmed.*

108	146
119	690
108	146
122	823
108	146
127	284

*P. A. Sawyer* for appellant Co-operative Savings and Loan Association.

*J. G. Myerly* for appellants John and E. S. Kent.

*C. W. Crim* and *E. A. Morling* for appellees.

DEEMER, J.—John and Elizabeth Kent, who were at one time the owners of the lots which are covered by plaintiff's mortgage, mortgaged the same to H. G. Graaf to secure the sum of five hundred dollars. Thereafter, on the first day of June, 1894, they gave to plaintiff the mortgage in suit, to secure the payment of the sum of one thousand one hundred dollars. In December of the year 1895, Graaf began foreclosure proceedings upon his mortgage, making the Kents, plaintiff, and others defendants. He obtained a decree, and on March 14, 1896, the sheriff sold the lots to Graaf, who took the certificate of sale. June 30, 1896, the Kents conveyed the premises to one J. B. Chastain by warranty deed, which recited that the conveyance was subject to plaintiff's mortgage. Thereafter, and on October 29, 1896, Chastain conveyed the lots to defendant N. B. Egbert. This conveyance was by quitclaim, which recited a consideration of one hundred dollars. January 9, 1897, either Egbert or his wife, S. J. Egbert, another of the defendants, paid Graaf the amount claimed by him under the certificate of sale, and Graaf assigned the same to S. J. Egbert. As no other or further redemption was made, the sheriff issued a deed to Mrs. Egbert on the fifteenth day of March, 1897. The deeds from the Kents to Chastain and from Chastain to Egbert were recorded at or about the time of their execution, and there is no doubt that both the Egberts had notice of the conditions in the deed from the Kents to Chastain. Instead of redeeming from the sale, plaintiff commenced this suit to foreclose on March 15, 1897, and now asks that it have judgment for the amount of its note, and a decree of foreclosure of the mortgage executed in the year 1894. The judgment



rendered against the Kents is not complained of, but it is insisted that plaintiff was entitled to a decree foreclosing its mortgage.

If it be true, as claimed by defendants, that S. J. Egbert purchased the sheriff's certificate of sale under which she received her deed, then there is no doubt that the decree as rendered by the trial court is correct; for plaintiff herein was made a party to the original foreclosure suit, and it failed to redeem within the time allowed by law. And the same result follows if it be found that the assignment and transfer of the certificate to Mrs. Egbert was merely a redemption by her husband from the foreclosure sale, in virtue of his deed from Chastain, unless it be true, as appellants claim, that the Egberts are estopped from asserting a claim hostile to plaintiff's mortgage by reason of the statement in the deed from the Kents to Chastain that it was "subject" to plaintiff's mortgage; and to this we will turn our attention, for it is the controlling question in the case.

This conveyance, as we have seen, was subject to plaintiff's mortgage, not to plaintiff's right to redemption in the Graaf foreclosure. The grantee did not assume or agree to pay it, it is true, but the form of his agreement was such that the land stood subject to the payment of the plaintiff's claim. *Trust Co. v. Mowery*, 67 Iowa, 113. Chastain purchased nothing more than the equity of redemption from the Graff foreclosure, and he held that subject to plaintiff's mortgage, which also gave it the right to redeem from the same foreclosure. But he did not agree to pay the plaintiff's mortgage, nor did he agree that it should always remain a lien upon the land, or that redemption might be made after the statutory period had expired. Notwithstanding the provision in the deed, plaintiff was required to keep its lien alive; and, if it suffered it to be extinguished by failure to make redemption, it cannot be heard to say that it is still a lien upon the land, and that the land should be subjected to the payment of the note it was made to secure. As it failed to

make redemption as provided in the Graaf decree, it lost all claim upon the property, and elected to look to Kent's personal obligation to pay the note. The Egberts did not, by their redemption, extinguish the lien of plaintiff's mortgage. That was brought about by its own failure to redeem from the sale under the Graaf mortgage. And as Chastain did not promise to pay plaintiff's mortgage, but took his deed subject thereto, the land should not be held for the payment of plaintiff's claim, if the lien of the mortgage has been extinguished by its failure to redeem from the foreclosure sale. In other words, while Chastain and the Egberts would be estopped from pleading any defect inhering in the plaintiff's mortgage, they are not precluded from taking advantage of the subsequent extinguishment of the lien of the mortgage due to the mortgagee's failure to redeem. There is a marked difference between a redemption by the judgment debtor and a redemption by his grantee. It is the policy of the law to secure to the debtor, as nearly as practicable, the full value of his property sold on execution; and, if the execution creditor fails to bid a just amount, the debtor should be permitted to transfer his interest to another for a fair consideration. And a junior lienholder is in no manner prejudiced by such transfer. It does not affect his right to redeem within the time allowed by law, and, if he is not willing to give more for the land than the amount for which it was sold, he should not prevent the debtor from realizing what he can for the property. When the grantee of the mortgagor acquires the right to redeem, and a junior lienholder fails to exercise his privilege, and is barred by lapse of time, the grantee may redeem without removing such bar, and thus perfect the title himself. *Moody v. Funk*, 82 Iowa, 4; *Bevans v. Dewey*, 82 Iowa, 85. As plaintiff lost its right to redeem and consequently its lien upon the land, and as the Egberts acquired a subsequent title, which is good against all the world, they are not estopped by reason of the provision in the Chastain deed from asserting that title. What rights the Kents may have against

how it would change what the court was required to do in entering the decree before such a payment. The decree simply gave judgment of foreclosure, and for an attorney's fee, as the mortgage provided. The judgment is **AFFIRMED**.

WATERMAN, J., takes no part.

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NANCY J. ALLISON v. C. M. PARKINSON, Executor, Appellant.

**Contracts: EXPRESS AND IMPLIED.** Where there is evidence of a contract for board, in which the price was not fixed, a recovery on an implied contract is authorized.

**Transaction with Decedent: TESTIMONY OF HUSBAND AND WIFE.** Code, section 4604, providing that no party to an action, and no husband or wife of any party, shall be examined as a witness in regard to any personal transaction between such witness and a person deceased, does not prohibit the husband of plaintiff from testifying to a conversation between plaintiff and deceased in which the husband did not participate.

**HYPOTHETICAL QUESTIONS.** A hypothetical question, based on facts as shown by the evidence, is proper, though not in all respects accurate.

**EXPERTS: Competency.** That witness is a practicing physician does not render him competent to state the value of nursing. But when he is told what disease was attended, the condition of the patient and the care required, a statement by such witness that he knew the value of the nursing, is *prima facie* evidence that he is qualified to answer the question, especially, where the only objection made is, that witness is not shown to have knowledge of the treatment received by the patient.

**Appeal: STRIKING ABSTRACT.** A motion to strike appellee's additional abstract from the file, because not served and filed in the time fixed by the rules of the court, where appellant has not been prejudiced by the delay, will be overruled.

*Appeal from Clinton District Court.*—HON. P. B. WOLFE, Judge.

SATURDAY, APRIL 8, 1899.

108	154
130	37
108	154
133	521

PROCEEDING in probate for the proof of a claim against the estate of John Parkinson, deceased. There was a trial by jury and a verdict and judgment for the plaintiff. The defendant appeals.—*Affirmed.*

*Hayes & Schuyler* and *Thomas & Thomas* for appellant.

*Ellis & Ellis* for appellee.

ROBINSON, C. J.—The plaintiff is the daughter of the decedent, and seeks to recover eight hundred and ninety-three dollars for board, housekeeping, care, and washing furnished the decedent, and for funeral expenses. The verdict was for the sum of four hundred dollars and judgment was rendered for that amount and costs. The evidence tends to show that the decedent made his home with the plaintiff and her husband during a considerable part of the time, commencing in September, 1890, and ending in November, 1895, when he died. He was about seventy-five years of age at the time of his death, and, while he lived with the defendant, suffered from weakness and disease to such an extent as to cause much offensive soiling of his clothing, and to require considerable extra care and labor.

I. The appellee served and filed an additional abstract several months after the time fixed by the rules for serving and filing such abstracts, and the appellant has filed  
1 a motion to strike it from the files on that ground.

We do not find that the appellant has been prejudiced by the delay to which he objects, and the motion is therefore overruled.

II. The husband of the plaintiff testified to a verbal agreement between the plaintiff and the decedent by which the latter was required to pay for board and all services he should require. The appellant contends that the testimony of the husband was admitted in violation of section 4604 of  
2 the Code. It has been repeatedly held, under that provision, that the husband or wife of a party to an action may testify to a conversation between such

party and one who is then deceased, in which the witness did not participate. *Erusha v. Tomash*, 98 Iowa, 510, and cases therein cited; *Dettmer v. Behrens*, 106 Iowa, 585. The facts of this case bring the testimony in question within the rule of those cases, and it was properly received in evidence.

III. Dr. McCormick was asked, in a hypothetical question, to state the value of the services of a nurse rendered as recited in the question, and was permitted to answer, notwithstanding the objection of the defendant that "the witness is not shown to have a familiarity or knowledge of the peculiar kind of treatment in this case in controversy, and, as

3       a hypothetical question, it does not state the facts as shown in this case." The witness had stated that he had been a practicing physician and surgeon for seven years, and that he knew the value of services for nursing. The fact that he was a practicing physician did not, alone, show competency; but the question specified the disease from which the decedent had suffered, his condition, and the care required, and the fact that the witness was a practicing physician, and the statement that he knew the value of the services for nursing, were *prima facie* evidence that he was qualified to answer the question. Moreover, the objection was not that the witness did not know the value of the services of a nurse as shown by the question, but that he had not been shown to have knowledge of the treatment

4       which the decedent received. It was not necessary, however, for the witness to know what the treatment had been, but to be qualified to give an answer based on the facts as alleged in the hypothetical question. That was based upon facts as evidence for the plaintiff tended to show them, and, even though it was not in all respects accurate, the answer should not for that reason alone have been excluded. *Meeker v. Meeker*, 74 Iowa, 352; *State v. Ginger*, 80 Iowa, 574; *Hall v. Rankin*, 87 Iowa, 261.

IV. Complaint is made of the charge to the jury on the ground that it authorized a recovery by the plaintiff on

an implied contract. It is said it was erroneous because the evidence for the plaintiff tends to show an express contract only. The evidence tended to show an express contract for the payment of three dollars per week for board, but the jury may have found that, although there was an express promise to pay for services not included in board, the price therefor was not fixed. The evidence tended to show an implied contract, and the portions of the charge criticised were therefore not erroneous. *Rogers v. Millard*, 44 Iowa, 466; *Wence v. Wykoff*, 52 Iowa, 644; *Van Sandt v. Cramer*, 60 Iowa, 424. Other objections to the charge are made, but we do not think them well founded. So far as called to our attention, it appears to have been fair and substantially correct.

V. Numerous questions are discussed by counsel which do not appear to be of sufficient importance to justify particular mention of them. We have examined all of them, but without finding any prejudicial error. There was evidence which authorized the jury to find that the services in question were rendered by the plaintiff under an agreement with the decedent that compensation therefor should be made. The husband had no direct interest in the agreement, and it was performed on the part of the plaintiff. Having rendered the service, she is entitled to compensation for it. There was a settlement of accounts made by the husband of the plaintiff with the defendant after the death of the decedent, but the jury was authorized to find that it did not include the claim of the plaintiff. We do not find any ground upon which the judgment of the district court should be disturbed, and it is therefore **AFFIRMED**.

THE BONNOT COMPANY, Appellant, v. NEWMAN BROTHERS  
*et al.*

**Contracts:** REPRESENTATIONS AS TO CONTENTS: *Negligence.* It is no defense to an action on a contract, part of which was typewritten and the balance printed matter, that the printed matter provided

- 1 that the goods sold, if not paid for, should remain the property of the seller, and that the purchaser, without reading the same, though having full opportunity so to do, was, on inquiry, informed that it was merely a guaranty of the goods sold.

**Appeal:** DEFAULT: *Notice of appeal.* Where a judgment is rendered

- 2 against one person by default, no notice of appeal need be served on him.

*Appeal from Polk District Court.*—HON. W. F. CONRAD,  
Judge.

SATURDAY, APRIL 8, 1899.

ON the fourteenth day of November, 1895, Newman Bros. and F. K. Ebersole entered into a written agreement, by the terms of which the latter agreed to deliver to that firm a large amount of machinery for a brick manufacturing plant at the price of six thousand two hundred and fifty dollars, on which he was to receive from that firm a stock of hardware at invoice prices, with freight added, and the balance in cash. This was in typewriting, except the following in fine print, pasted on the paper: "The above machinery is guarantied to be well made, of good materials, and to do good work when clay is prepared and machinery is geared and operated according to the manufacturers' instructions. In case the purchaser is unable to make the machinery perform as above guarantied, written notice shall immediately be given the Bonnot Co., and their agent from whom the machinery was purchased, by registered letter, giving full particulars, and reasonable time shall be allowed and friendly assistance given, in order that the cause may be removed.

Then, in case the machinery cannot be made to fulfill the warranty, the manufacturers shall not be held liable for any damages or expenses of re-loading the machinery on board cars, or freight from their works. If the purchaser fails to make it do good work through neglect to follow the instructions of the manufacturers, then he shall pay all necessary expenses incurred. The above machinery to be and remain the property of the Bonnot Co. until paid for. There are no understandings or agreements outside of this written contract." On the eighteenth day of the same month, Ebersole ordered, in writing, a portion of the machinery, valued at two thousand two hundred and sixty-five dollars from the Bonnot Company, the plaintiff herein, and agreed to pay therefor in cash. This was on a printed blank of that company, including the extract set out. As only one thousand dollars was paid by Ebersole, and Newman Bros. refused to pay the balance, this action was brought for the possession of the machinery sold by the plaintiff. Newman Bros. answered, and by way of cross petition alleged that the portion of the printed matter, "the above machinery to be and remain the property of the Bonnot Company until paid," was inserted by mutual mistake, or else through the fraud of Ebersole, and prayed that Ebersole be made a party defendant, and the contract be so reformed as to exclude it. This issue was thereupon first tried in equity, and the contract reformed as prayed. The plaintiff appeals.—*Reversed*

*Cummins, Hewitt & Wright* for appellant.

*Read & Read* and *S. S. Cole* for appellees.

LADD, J.—I. While persons on the faith of another's word alone, every day sign contracts without reading them, the law has ever adjudged this such indifference as will preclude a remedy in event of deception. This is on the ground that, having the full means of knowledge and of determination, they nevertheless rely upon the representations of



another having no better facilities for knowing, without themselves exercising the means open for ascertaining the truth. *McCormack v. Molburg*, 43 Iowa, 562; 1 *McKinney v. Herrick*, 66 Iowa, 414; *Wallace v. Railway Co.*, 67 Iowa, 547; *Roundy v. Kent*, 75 Iowa, 665; *Jenkins v. Coal Co.*, 82 Iowa, 618; *Railway v. Cox*, 76 Iowa, 306. It may be conceded that the contract in handwriting had been read by William Newman, and that the printed guaranty, including the clause allowing the Bonnot Company to retain title until paid, was added to that by being pasted on the duplicate copies in typewriting, which were subsequently signed, and also that I. A. Ebersole did not read that portion of it to the Newmans. But when William was about to attach the firm name to the duplicates so prepared, he noticed the printed portion, and upon inquiry, was told by Ebersole it was simply a guaranty of the Bonnot Company. Knowing this had not been read, and without himself reading the printed portion, he signed the contracts in duplicate. Though able to read, and having the opportunity to do so, he chose to rely on the statement of Ebersole. No artifice whatever was employed to deceive. If the printed portion was added without previous understanding, and Ebersole omitted to read it, this was known to William Newman, who nevertheless neglected to read it for himself, and, if wronged, it is the result of his own folly. It should be added that Ebersole denies misrepresenting the terms of the contract, and insists that it was prepared precisely as agreed. We have found it unnecessary, however, to consider this phase of the case.

II. That the record is such as to demand a hearing on the merits appears from *McGillvray v. Case*, 107 Iowa,

17. No notice of appeal was served on F. K. 2 Ebersole against whom judgment was entered by default. That none was required in order to confer jurisdiction is well settled. *Moore v. Held*, 73 Iowa, 540; *Payne v. Raubinek*, 82 Iowa, 589.—REVERSED,

108	161
1133	128

108	161
141	534

## C. J. HARLAN, Appellant, v. E. C. RICHMOND.

**Intoxicant:** *Permit law construed.* Acts Twenty-third General Assembly, Code 85, section 10, defines the cases in which a permit holder may lawfully sell intoxicants, and requires him to refuse unless he has reason to believe the applicant's statements are true, "and in no case" unless he personally knows the applicant, and that he is not intoxicated nor in the habit of using intoxicants as a beverage, nor a minor, etc. *Held*, that though the phrase introduced by the words "and in no case" lacks a verb, and something must be supplied to make the meaning clear, yet the limitation expressed is on the right to sell, and the seller must know the applicant, and that he is not a minor, nor in the habit of using intoxicants as a beverage, etc.

**ILLEGAL SALES:** *Evidence.* Most, if not all, of six applicants for the purchase of intoxicants had been seen intoxicated, some of them more than once. Four had been arrested and punished for drunkenness. The seller admitted having seen one of them drunk before he sold to him, and he had heard of another being drunk and had refused to sell him liquor. The testimony opposing was of a negative character only. *Held*, that they were addicted to the use of intoxicants as a beverage, and the sales to them were illegal, under Acts Twenty-third General Assembly, chapter 85, section 10.

**Depositions:** **VARIANCE FROM NOTICE.** Under a notice to take depositions of *J. T. Langley, John Potter, Ode Terrell, and G. Berlin*, were taken the depositions of *J. T. Longley, Jonathan S. Potter, S. Orren Tyrrell, and A. H. Berlin*. *Held*, that the variance was fatal under Code, 1878, sections 3721, 3722, requiring the notice to contain "the names of the witnesses."

*Appeal from Howard District Court.*—HON. L. E. FELLOWS, Judge.

SATURDAY, APRIL 8, 1899.

**ACTION** to abate a nuisance caused by the sale of intoxicating liquor. From a decree in defendant's favor, plaintiff appeals.—*Reversed.*

*E. R. Acres* and *E. W. Cutting* for appellant.

*B. N. Hendricks* and *Reed & Reed* for appellee.

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WATERMAN, J.—It appears from the record that the defendant is a registered pharmacist, and that at the time of the acts complained of he held a permit for the sale of intoxicating liquor, duly issued under chapter 35, Acts Twenty-third General Assembly. The complaint is that he violated the terms of section 10 of that act, by selling liquor to persons who were in the habit of using it as a beverage. As the requirements of this section are in dispute, we may properly, at the outset, give our construction of its language. The section is as follows: "Before selling or delivering any intoxicating liquors to any person, a request must be printed or written, dated of the true date, stating the applicant is not a minor, and the residence of the signer, for whom and whose use the liquor is required, the amount and kind required, the actual purpose for which the request is made and for what use desired, and his or her true name and residence, and, where numbered, by street and number, if in a city, and that neither the applicant nor the person for whose use requested habitually uses intoxicating liquors as a beverage, and the request shall be signed by the applicant by his own true name and signature, and attested by the permit holder who receives and fills the request by his own true name and signature in his own handwriting. But the request shall be refused, notwithstanding the statement made, unless the permit holder has reason to believe said statement to be true, and in no case unless the permit holder filling it personally knows the person applying, that he is not a minor, that he is not intoxicated, and that he is not in the habit of using intoxicating liquors as a beverage; or, if the applicant is not so personally known to the permit holder, before filling the said order or delivering the liquor he shall require identification, and the statement of a reliable and trustworthy person, of good character and habits, known personally to him, that the applicant is not a minor, and is not in the habit of using intoxicating liquors as a beverage, and is worthy of credit as to the truthfulness of the statements in the application,

and this statement shall be signed by the witness in his own true name and handwriting, stating his residence correctly." In our opinion, in order to comply with the law, the seller must believe the statements in the application to be true; he must know the applicant, or have him identified; and he must know, or obtain proof, that such applicant is not "in the habit of using intoxicating liquors as a beverage."

1 It is true that the phrase introduced by the words "and in no case" is wanting in a verb; that something must be supplied to make the meaning clear. But, when it is considered that this section is defining the cases in which the permit holder may lawfully sell, it appears reasonably plain that the limitation expressed is upon such right. If there is any ground of complaint in this case, it is that defendant sold the liquor to persons who were in the habit of using it as a beverage. If he did this, the law was violated, although defendant was ignorant of the habits of the applicant, for the law requires him to know that they are not so addicted before he makes the sale. He always sells at his peril. When in doubt, or ignorant of the facts upon which he should be informed, he must require proof. *State v. Thompson*, 74 Iowa, 120, and cases therein cited. In each instance of the several sales upon which plaintiff's case is founded, formal applications were signed by the purchasers as required by law, and each of such purchasers was a witness, and testified that the liquor was procured for medicinal purposes; and defendant testifies that he made the sales in good faith. Whatever suspicions we may have as to these particular sales must be set aside, in view of these positive and uncontradicted statements. *State v. Hoagland*, 77 Iowa, 135.

We come then to the question whether these persons were such as the law permitted defendant to deal with in transactions of this nature. Before passing to the evidence, it is well to determine what testimony we have in the record which may properly be considered. Notice was  
2 served by plaintiff of the taking of the depositions of witnesses named as follows; "J. T. Langley, John

Potter, Ode Terrell, and G. Berlin." Under this notice the testimony of J. T. Longley, Jonathan S. Potter, S. Orren Tyrrell, and A. H. Berlin was taken. Defendant moved to suppress these depositions, and also objected to their being read in evidence, on the ground that no notice of their taking had been given. There is such a variance in the names of the witnesses that this evidence should not be considered. Where depositions are taken upon notice, such notice must contain the name of the witness. Code 1873, sections 3721, 3722. See, as to effect of a variance in name, *Strayer v. Wilson*, 54 Iowa, 565; *Glenn v. Gleason*, 61 Iowa, 28.

We do not think the evidence which was received relating to the reputation of defendant's place of business was admissible. *State v. Fleming*, 86 Iowa, 294, 298. But upon this point we need not definitely pass, for, giving consideration to all the testimony of this subject, we think its decided weight is in defendant's favor.

Upon the issues as to the habits of the purchasers in the sales complained of, there is ample evidence, aside from that which we have discarded, to show that these men were in the habit of using intoxicating liquors as a beverage.

2 Most, if not all, of them had been seen in an intoxicated condition, some of them more than once, and one of them on several occasions; and, of the six, four had been arrested and punished for drunkenness in the village where defendant's business is carried on, previous to the sales here charged. Defendant himself admits having seen one of them under the influence of liquor on one occasion before he made the sale to him; and, of another, he says that he had previously heard of his being intoxicated, and had refused to sell liquor to him. Opposed to this is testimony of a negative character only. We are able to come to but one conclusion: These parties were of the class to which defendant was forbidden by law to sell. The injunction should have issued.—**REVERSED.**

## W. E. HANKS, Appellant, v. C. A. FLYNN.

**Contract of Assumption: CONSTRUED.** Where, on the dissolution of a partnership, the remaining partner agrees to pay the firm liabilities, he is not concluded from questioning whether any particular claim is a firm liability, where it appears that he was to pay all firm liabilities whether they appeared on the books or not.

*Appeal from Lucas District Court.*—HON. F. W. EICHELBERGER, Judge.

SATURDAY, APRIL 8, 1899.

ACTION at law, aided by attachment, to recover eight hundred and fifty dollars, with interest, on a written contract. Defendant answered, admitting the execution of the contract, denying that anything was due thereon, and alleging that the same was paid in a manner as will hereafter appear. Defendant, by way of counterclaim, asks to recover five hundred dollars damages for a wrongful suing out of the attachment. Plaintiff replied, denying payment, and denying that the attachment was wrongfully sued out; and verdict and judgment were rendered in favor of the defendant for one hundred dollars. Plaintiff appeals.—*Affirmed.*

*Stuart & Bartholomew* and *W. B. Barger* for appellant.

*Temple & Hardinger* and *G. G. Reeside* for appellee.

GIVEN, J.—Plaintiff and defendant entered into a co-partnership in the lumber and hardware business. The only money put into the business, namely, one thousand five hundred dollars, was borrowed from the First National Bank of Chariton, for which these parties executed a promissory note signed by each individually; one S. L. Holman signing as security. This note was dated April 27, 1897, and was due six months after date, with interest at eight per cent.

108	168
137	542

108	168
139	640

J. HARVEY, Appellant, v. R. L. HENRY *et al.*

**Contract: EVIDENCE.** Machinery was purchased with notes secured by a mortgage on the machinery, and a year later the seller, as agent for another, sold the buyers other machinery, taking back in payment part of the machinery formerly sold, certain other machinery, and notes of the buyers, the sale being by written agreement, which stipulated for the taking of such notes and machinery. In an action on the notes and mortgage given for the first sale, the makers and a third person testified that, as an additional inducement for the sale, the payee, who had a special interest therein, had agreed, individually, to cancel and surrender them. The payee denied this, stating that the agreement was an exchange of the new property for the old, the difference in price being represented by the notes given by the makers. There was a dispute as to the price of the new machinery, and as to the credit to be given for the old; but, conceding defendant's testimony to be correct, the notes given and the credit allowed equalled the price, leaving no margin as a consideration for the surrender of the notes in suit. The mortgage to secure the notes was not canceled and the makers never asked to have it done, or to have the notes surrendered, but promised to pay if a discount were allowed. *Held*, insufficient to show an agreement by the payee to cancel the notes and the mortgage, since the makers had the burden.

**Parol Variance: COLLATERAL CONTRACT.** An agent's oral agreement, in making a sale in which he had a special interest, by written contract that, as an additional inducement, he will surrender certain notes held by him against the buyers, may be shown by parol in an action on such notes by the agent, though the written contract of sale, made in the name of the principal, was complete; since, as against the agent, the oral contract did not conflict with the written one, but was collateral thereto.

*Appeal from Van Buren District Court.*—HON. T. M. FEE,  
Judge.

SATURDAY, APRIL 8, 1899.

ACTION in equity to recover an amount alleged to be due on two promissory notes, and to foreclose a chattel mortgage given to secure their payment. There was a hearing on the

merits, and a decree for the defendants. The plaintiff appeals.  
—*Reversed.*

*Wherry & Walker* for appellant.

No appearance for appellee.

ROBINSON, C. J.—In the year 1895 the defendants R. L. Henry and Wesley Henry purchased of J. Harvey & Co. an engine, tank, belt, weigher, and stacker, for the agreed price of nine hundred and seventy-five dollars. In payment the defendants gave their three promissory notes, of which one for four hundred dollars was payable January 1, 1896, one for four hundred dollars was payable January 1, 1897, and one for one hundred and seventy-five dollars was payable January 1, 1898. To secure the payment of the notes, the defendants executed to the seller a mortgage on the property purchased. The note which first became due has been paid. This action is brought to recover the amount of the other two notes, which the plaintiff claims to own by virtue of blank indorsements, and to foreclose the mortgage. In the year 1896 the defendants purchased of the Nichols & Shepard Company a traction engine, separator, with truck, wagon, straw stacker, belts, and other appurtenances, and gave, as part payment, the engine and certain appurtenances, and the stacker, purchased the year before of J. Harvey & Co., and a separator which the defendants had used several years, and promissory notes for the aggregate amount of one thousand six hundred and ninety dollars. The contract for the new outfit was made through the plaintiff, as agent for the Nichols & Shepard Company; and the defendants claim that the contract price for the outfit was two thousand four hundred and forty dollars, on which credit for four hundred dollars, for the note to J. Harvey & Co. which had been paid, and three hundred and fifty dollars for the old separator, were to be given, and that the notes in suit were to be canceled, and with the mortgage, were to be surrendered to the defendants. The plaintiff avers that the contract price for the new outfit was but two thousand two hundred and forty dollars, and that the



credit for the old engine, separator, and other property, was but five hundred and fifty dollars, and denies that the contract required the notes in suit to be canceled and surrendered.

I. When the contract for the new outfit was entered into, the defendants signed an order for it, addressed to the Nichols & Shepard Company, which contained the following: "The undersigned agree to receive said machinery, \* \* \* and pay in cash the freight and charges thereon from the factory, and also agree to pay to your order \* \* \* the further sum of \$——, as follows: Old steam outfit taken in trade at \$550.00, including an Aultman & Taylor Separator; note due January 1st, 1897, for \$300.00; note due January 1st, 1898, for \$595.00; note due January 1st, 1899, for \$595.00; and note due January 1st, 1900, for \$200.00." The order does not contain any reference to the cancellation of the notes in suit, but the defendants contend that it was required by a verbal stipulation. That is denied by the plaintiff, and he contends that the order is apparently complete, free from ambiguity, and should be regarded as expressing the entire contract of the parties to the transaction. He insists, therefore, that it cannot be contradicted or varied by parol evidence. The general rule for which the appellant contends is well settled. Evidence of a contemporaneous oral agreement is not admissible to vary, add to, or contradict a valid agreement in writing which is clear, definite, and complete. *Fawcner v. Paper Co.*, 88 Iowa, 169, and authorities therein cited. But such evidence is admissible to show "the existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, if, from the circumstances of the case, the court infers that the parties did not intend the document to be a complete and final statement of the whole transaction between them." 7 Am. & Eng. Enc. Law, 91; 17 Am. & Eng. Enc. Law, 443. The order in question, when accepted, becomes a contract in writing between the defendants and the Nichols & Shepard Company, and

parol evidence to show that the company was required to cancel the notes in suit would tend to add to the writing, and, as between the parties to it, would not be admissible. But the evidence shows that the plaintiff had a special interest in the contract, in the compensation he was to receive for securing it. He states that he was required to take the old outfit in settlement with the company, and he did take it. He knew that he would be required to do so when the contract was made; and, since it was satisfactory to his principal for him to do so, there was no legal objection to his agreeing to cancel and surrender the notes which are in controversy, to induce the defendants to enter into the contract. If there was an undertaking to do so, it was collateral to the contract in writing, and is not in conflict with it. Proof that it was made would not in any manner affect the contract entered into by the defendants with the company. This case is unlike that of *Horn v. Hansen*, 56 Minn. 43 (57 N. W. Rep. 315), cited by the appellant.

II. If the agreement was made by the defendants with the plaintiff, as claimed, it was upon a sufficient consideration; but it is insisted that the evidence fails to show that it was made. The two defendants and their nephew  
2 testify, in substance, that the plaintiff agreed to take back the machinery sold by J. Harvey & Co. the year before, for nine hundred and seventy-five dollars, surrender the notes in suit, to the amount of five hundred and seventy-five dollars, give credit on the price of the new outfit for the four hundred dollars paid on the old one, allow three hundred and fifty dollars for the Aultman & Taylor separator, and take notes of the defendants for one thousand six hundred and ninety dollars. The defendants had purchased the Aultman & Taylor separator and a horse power, seven years before, for six hundred and eighty-five dollars, and had used it to do their own threshing, and, in addition, as we understand the evidence, had run it two years in threshing for others. The horse power was not included in the transaction in con-

troversy. The list price of the property sold to the defendants by the company was two thousand four hundred and forty dollars. There is a discrepancy between the order as it now appears and a copy of it given to the defendants. In the original the amount allowed for the old outfit appears to have been changed from seven hundred and fifty dollars to five hundred and fifty dollars, while in the copy it is seven hundred and fifty dollars. The cause of that discrepancy is not clearly explained, but the plaintiff claims that he discounted the list price of the new outfit two hundred dollars, and the payments specified in the order amount to the reduced price; but that is denied by the defendants. The plaintiff claims that the alteration was made when the order was signed; but it is not necessary to determine who is right in regard to that matter. Assuming that the defendants' theory respecting it is right, their claim appears to be that the plaintiff agreed to take back the property sold in 1895, after it had been used one year, and allow therefor just what had been paid for it, and that, in addition, he agreed to allow three hundred and fifty dollars for a separator which had been used seven years, and which, with a horse power, had been purchased when new for less than twice that sum. The value of this old machinery at the time of the transaction in question is not shown, but it is a matter of common knowledge that the value of such property depreciates greatly by use and lapse of time. The interest of the plaintiff in the sale of the new outfit is not shown, but it was not sufficient to take all of the old machinery received, and it seems that the alleged agreement would have been an improvident one on the part of the plaintiff. Their testimony is disputed by the plaintiff, who states that the transaction was an exchange of the new property for the old, and that the notes which the defendants gave represented the agreed difference between the values of the new and the old. The plaintiff is corroborated in that respect by the order. It shows that the total amount allowed for all the old property, including the Aultman & Taylor

separator, was five hundred and fifty dollars, or, if the defendants are right as to that, seven hundred and fifty dollars. That sum, added to the amount of the notes, would make two thousand four hundred and forty dollars, or just the price the defendants say they were to pay for the new outfit, and allow nothing for the notes in suit. Since the defendants admit that the order shows a part of what was allowed for the old machinery, it is fair to presume against them that it shows all that was allowed. The conduct of the defendants tends to sustain the claim of the plaintiff. They say that the plaintiff stated, as a reason for not surrendering the notes in suit when settlement was made with the Nichols & Shepard Company, that they were not in his possession, and several days would be required in which to procure them; but the settlement was not made for several days after the order to the company was given. The mortgage executed to secure the notes in suit was not canceled, and it does not appear that the defendants, at any time after the settlement for the new outfit was made, asked to have the notes surrendered or the mortgage satisfied of record. Correspondence between the defendants and attorneys who held the notes in suit for collection satisfies us that the defendants at that time did not claim that the notes had been paid, but that they offered to pay both if a discount were allowed. On the twentieth day of January, 1897, they wrote to one of the attorneys concerning the notes as follows: "The notes are made payable at Bonaparte. Now, when you send the notes and mortgage to Farmers' & Traders' Bank, Bonaparte, Iowa, we will pay them at discount of ten per cent. If the owners of the notes had sent the four hundred dollar note which was due January the 1st, we would have paid it long ago." It is true the defendants claim that their offers were made in the belief that the notes had been transferred to an innocent holder; but the explanation, when viewed in the light of all the facts disclosed by the record, is not satisfactory. It is fair to presume, in the first instance, that the order in question expresses fully the con-

tract as to all matters of which it purports to treat. It states what was allowed for the old machinery, and the defendants have failed to overcome the presumption that the statement in that respect is full and correct. The burden was on the defendants to prove the alleged verbal agreement, and we are of the opinion that they have failed to do so. It is true that three witnesses testify to the effect that the agreement was made, and that but one testifies that it was not; but we are of the opinion that his testimony, with the written order, and the presumption which it authorizes, the conduct and letters of the defendants, and the unreasonable character of some of their claims, outweigh the testimony relied upon to prove the alleged agreement. We therefore conclude that the plaintiff is entitled to recover the amount of the notes in suit, and to a foreclosure of his mortgage so far as it includes property not transferred to the Nichols & Shepard Company in consideration of the purchase of the new outfit. The decree of the district court is **REVERSED**.

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**HARDIN COUNTY V. A. WELLS, Appellant.**

**Plea of Payment:** CONSTRUCTION. Answer, of one whose liability was not discharged unless the sum of \$40,000 was paid, that that sum had "substantially, if not wholly," been paid, is insufficient. "Wholly" and "substantially" are not equivalents.

*Appeal from Hardin District Court.*—HON. B. P. BIRD-  
SALL, Judge.

SATURDAY, APRIL 8, 1899.

ACTION at law on a subscription for the payment of money. A demurrer to one division of the answer was sustained. There was a trial by jury, and a verdict and judgment for the plaintiff. The defendant appeals.—*Affirmed.*

*H. L. Huff* for appellant.

*E. H. Lundy, County Attorney*, for appellee.

ROBINSON, C. J.—The only questions we are required to consider are those involved in the ruling on the demurrer. The subscription is as follows: “We, the undersigned, promise and agree to pay into the treasury of Hardin county, Iowa, for the use of said county, the sum set opposite our respective names: provided, that this subscription shall become binding and obligatory in the event that the legal voters of said county shall at any time during the year A. D. 1891 authorize the board of supervisors to construct, for the use of said county, a court house, at Eldora, Iowa, at an expense of not exceeding the sum of fifty thousand dollars, and a jail at an expense not exceeding the sum of ten thousand dollars, and to appropriate therefor, of the funds of said county, the sum of twenty thousand dollars, and of the funds to be realized upon this subscription the sum of forty thousand dollars, when, and in such case, the several sums hereto subscribed shall become due and payable into the treasury of said county as follows, to wit: The one-fourth part thereof whenever the vote shall be taken, and the result declared in favor of the aforesaid authorization; the second one-fourth part thereof when the board of supervisors of said county shall have executed a contract for the erection of a court house as aforesaid; and the remaining one-half thereof when the foundation of said court house shall be completed. [Signed] R. Wells, seventy-five dollars. R. Wells twenty-five dollars.” The petition alleges that the voters of the county did, during the year 1891, authorize the board of supervisors to construct, for the use of the county, a court house at Eldora, according to the terms of the subscription; that the board appropriated therefor the funds required by the subscription, and entered into a contract for the erection of a court house; that the foundation therefor was completed on or about the first day of January, 1893; and that there is

now due on the subscriptions of the defendant the sum of one hundred and thirty-six dollars. In the third division of his answer the defendant alleges that he is not liable on the subscription, for the reason that "he is informed and believes, and charges the fact to be, that the people of Hardin county, who subscribed to the said court house and jail fund, have paid into the county treasury, of their subscriptions, substantially, if not wholly, the sum of forty thousand dollars,—the limit of the amount of the said subscriptions, when paid in, to be appropriated by the board of supervisors of said county as per the terms of the said contract of subscriptions." The division contains other averments, but they add nothing to those quoted which we need to consider. .

The ground of the demurrer which presents the question of chief importance is that the third division of the answer does not state that the forty thousand dollars have been paid. We are of the opinion that the ground is well taken. To say that a given sum is "substantially, if not wholly," paid, is not the equivalent of a statement that it is fully paid. What the defendant meant by the word "substantially" does not clearly appear. The ordinary meaning of the word is: "In a substantial manner; in substance; essentially." Webster International Dictionary. Whether the defendant would have regarded the payment of the specified amount, less one dollar, or one hundred dollars, or two hundred dollars, as payment of "substantially" all that was required, can only be conjectured. That the word was not used as meaning full payment is shown by its connection with the words "if not wholly." But the liability of the defendant was not discharged unless the full sum of forty thousand dollars was paid. The payment of less, however near the required sum, would not have had that effect. The petition alleged that one hundred and thirty-six dollars were due and owing on the subscription from the defendant. The third division of the answer did not deny that allegation, in terms, nor set out facts which showed that it was not true, nor plead any matter which constituted a

defense to the cause of action alleged in the petition. We conclude that the demurrer was properly sustained.

This conclusion renders it unnecessary to determine other questions discussed by counsel. The judgment of the district court appears to be right, and it is **AFFIRMED**.

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LUCY JEROLMAN, Appellant, v. THE CHICAGO GREAT WEST-  
ERN RAILWAY COMPANY.

**Appeal: REVIEW OF INSTRUCTIONS: *Abstract.*** Where the abstract does not contain the evidence, but appellant's statement that it was

- 1 conflicting upon a certain issue is not denied, errors in giving instructions on that issue may be considered.

**Contributory Negligence:** An instruction that, in order to recover for injuries, a passenger must have been free from all fault or

- 2 negligence contributing to produce the injury, is erroneous, as holding him to the exercise of extraordinary care, and preventing a recovery though the negligence was slight, and did not amount to want of ordinary care.

**Instructions: DEGREE OF PROOF.** A statement that plaintiff must

- 3 prove want of contributory negligence to the satisfaction of the jury is not a happy expression, but was probably not misleading in view of other instructions.

*Appeal from Bremer District Court.*—HON. J. F. CLYDE,  
Judge.

SATURDAY, APRIL 8, 1899.

THE plaintiff appeals from a judgment duly entered on a verdict returned by the jury in favor of the defendant.—*Reversed.*

G. W. Ruddick for appellant.

O. C. Miller and D. A. Long for appellee.

LADD, J.—The train reached Shellrock at 10 o'clock p. m. It was dark, and the plaintiff, a passenger to that

740L, 105 la- 12.

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130	271
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131	536
108	177
137	284



place, in walking, from where she alighted, along the defendant's depot platform, which was about three feet above the surface, and without railing, to the omnibus stand, stepped from it to the ground, and was injured. She based her right of recovery on alleged freedom from negligence on her part contributing to the injury, and negligence on the part of the defendant in not having the platform properly lighted, and

1        guarded by a suitable railing. The abstract does not contain the evidence, but the appellant's statement that, on the issues raised by the pleadings, it was conflicting, is not denied. We may, then, consider the errors assigned in giving the instructions. See *Kelleher v. City of Keokuk*, 60 Iowa, 476; *State v. Goering*, 106 Iowa, 636.

After mentioning the undisputed facts, the court, in the third paragraph, said: "The issues therefore that remain for you to consider are these, namely: *First*. Was plaintiff's fall from the depot platform due to any negligence of the defendant or its employes? *Second*. Was the plaintiff herself free from all fault or negligence that contributed to produce the fall? *Third*. Was the plaintiff injured by the fall? and the extent of such injuries, if any. In order to recover herein, the plaintiff must establish to your satisfaction, by a preponderance of the evidence, each

2        and all of these three propositions." Exception is first taken to the requirement that plaintiff, in order to recover, must be "free from all fault or negligence that contributed to produce the fall," or as put in the sixth paragraph, it must appear "that such fall was not in any manner due to any fault or negligence on the part of the plaintiff herself," or, as in the eighth, "that she was free from all fault or negligence which contributed directly to produce the fall in question." No point is made concerning the use of "fault" as synonymous with "negligence." In the connection employed, it may not have been misunderstood. *Railway Co. v. Lanier*, 83 Ga. 587 (10 S. E. Rep. 280); *Mining Co. v.*

*Patton*, 129 Ind. Sup. 472 (28 N. E. Rep. 1113). The appellant rightly contends that the plaintiff should be held only to the exercise of ordinary care for her own safety. The law will not measure the extent. Failure so to do must contribute to her injury, in order to defeat the action. *Artz v. Railway Co.*, 38 Iowa, 295; *McAunich v. Railway Co.*, 20 Iowa, 338; *Haley v. Railway Co.*, 21 Iowa, 15. The appellant contends that, "when the rule of ordinary care obtains, then mere slight omission or slight faults is no breach of the rule, and does not defeat recovery. It can only be such as amount to lack of ordinary care." The use of the term "ordinary negligence," while not approved, was held not erroneous, in *Kerns v. Railway Co.*, 94 Iowa, 125. Where only ordinary care is required, any want of its exercise is negligence, and this is true regardless of the extent or degree of failure or omission. Slight want of ordinary care is negligence, for that it is a failure to exercise the degree of care exacted. If an injury is caused thereby it flows as inevitably from the slight omission of duty, as though occasioned by a willful wrong. The material inquiry is, always, was there any failure to exercise ordinary care; was anything done or omitted which a person of ordinary prudence, under like circumstances, would not have done or omitted; and, if so, was the injury caused thereby, or did such failure contribute thereto? If the injury was occasioned by slight want of ordinary care, when it would not have resulted but for that, then it is as much the outcome of negligence as though caused by some grievous and wanton disregard of duty. So, where any want of ordinary care, however slight, contributes to the injury, as an efficient cause thereof, recovery cannot be had; for the law will not undertake to determine which of two wrongdoers is most at fault. These conclusions find support in the following authorities: *Cremer v. Town of Portland*, 36 Wis. 92; *Strong v. Railroad Co.*, 61 Cal. 326; *Railway Co. v. Graham*, 95 Ind. 291; *Railway Co. v. Gorbett*, 49 Tex. 573; *Monongahela City v. Fischer*, 111 Pa. St. 9 (2 Atl. Rep. 89); *Manly v. Railroad*

Co., 74 N. C. 655; 7 Am. & Eng. Enc. Law 2d ed.) 377; Cooley, Torts, 630; Beach, Contributory Negligence (2d ed.), section 19; *Railroad Co. v. Fitzpatrick*, 35 Md. 32; *Dowling v. Allen*, 102 Mo. 213 (14 S. W. Rep. 751); *Kerwhaker v. Railroad Co.*, 3 Ohio St. 172 (62 Am. Dec. 246); *Dush v. Fitzhugh*, 2 Lea. 307; note to *Freer v. Cameron*, 55 Am. Dec. 671. See *O'Keefe v. Railroad Co.*, 32 Iowa, 467. Slight want of ordinary care must not be confused with slight negligence, which is usually applied to an omission of extraordinary care. Such an omission may be said to be confined to the territory lying between the boundaries of ordinary and extraordinary care, and, in a case involving the exercise of ordinary care only, will not defeat recovery. *Dreher v. Town of Fitchburg*, 22 Wis. 675 (99 Am. Dec. 91); *Hughes v. Muscatine County*, 44 Iowa, 675. The vice of the instruction, emphasized in the passage quoted from others, is that all negligence is excluded, and the plaintiff held to the exercise of extraordinary care for her safety. Had fault or negligence, as used, been defined, this would have been obviated. Without such limitation, the jury was warranted in understanding that any negligence whatever on the plaintiff's part, however slight, required a verdict for the defendant. *Hughes v. Muscatine County*, *supra*, where an instruction that the plaintiff must show she was "entirely free from any negligence that helped to bring about the accident"

3 was held erroneous, is precisely in point. Again, the thought of the court was not happily expressed in the last sentence of the instruction, though we are inclined to think it, in view of other portions of the charge, not misleading. See *Callan v. Hanson*, 86 Iowa, 421; *Way v. Railway Co.*, 40 Iowa, 344. The plaintiff was required to prove her case, not to the satisfaction of the jury, but merely by a preponderance of the evidence. *Bryan v. Railway Co.*, 63 Iowa, 465; *Turner v. Yunker*, 76 Iowa, 261.

The other errors assigned merit no attention.—  
REVERSED.

J. F. KNORR and MARTIN SCHAFER v. W. F. LOHR and WILLIAM BOYLE, Sheriff, Appellants.

**Homestead: SELECTION** Under Code 1873, section 1994 (present Code, section 2977), providing that an owner's homestead must embrace  
2 the house used by him as a home, and that, if he has two or more houses thus used, he may select either as his homestead, the selection of a house not so used is unauthorized and void.

**ABANDONMENT.** Code 1873, section 1994 (present Code, section 2977), provides that an owner's homestead must embrace the house used  
3 by him as a home, and that, if he has two or more houses thus used, he may select either as his homestead. *Held*, that the selection of a house not so used, being void, is not an abandonment of homestead rights in a house used as a homestead.

**Fraudulent Conveyance.** A conveyance of land without consideration,  
1 to hinder and delay creditors, gives the grantee no title or right of possession, as against creditors.

*Appeal from Plymouth District Court.*—HON. F. R. GAYNOR, Judge.

SATURDAY, APRIL 8, 1899.

ACTION in equity to set aside a sheriff's sale of lands, and to enjoin the execution and delivery of a sheriff's deed thereunder. From the decree rendered, the defendants appealed.  
—*Affirmed*.

*Lohr, Gardiner & Lohr* for appellants.

*Ira T. Martin* for appellees.

GIVEN, J.—I. Joseph Stinton, now deceased, was the owner in fee of the southwest one-fourth of section 28, and the northwest one-fourth of section 34, township 92, range 47, Plymouth county, Iowa, and had been in the use and possession thereof for many years. Prior to 1889 he and his family resided on that part in section 34, the buildings occupied being upon the northwest one-fourth of said northwest one-

fourth of section 34. In 1889, he removed with his family to the land in section 28, the buildings on which are upon the southwest one-fourth of that quarter section. On September 15, 1893, Joseph Stinton executed a warranty deed of all of said lands to his wife Sophia, for the recited consideration of nine thousand six hundred dollars, but in fact without any consideration. This deed was subject to mortgages on the lands aggregating four thousand two hundred and fifty dollars, and it was not filed for record until March 7, 1895. Joseph Stinton was largely indebted at the time he executed this deed, and evidently made it to hinder and delay his creditors,—a fact that Mrs. Stinton must have known, though she seems to have had little understanding of business matters or of this transaction. Mr. Stinton and his family continued thereafter to reside upon the land in section 28, and he to use and control all of the land as before, up to the time of his death, March 2, 1895, after which Mrs. Stinton and her family continued to occupy the home and to use all of the land, up to July 8, 1895. On that date, Mrs. Stinton, for the recited consideration of ten thousand dollars, but in fact for the consideration of two hundred dollars, conveyed all of said land to the plaintiffs, warranting the title except as to incumbrances. The defendant W. F. Lohr had a judgment for one hundred and twenty-two dollars and sixty-five cents against Joseph Stinton, upon which execution was issued, and placed in the hands of the defendant W. M. Boyle, sheriff, for service. On the twenty-sixth day of July, 1894, the sheriff levied this execution upon all of said lands, and advertised the same for sale. Notice of said levy and sale was duly published, and was served on Joseph Stinton on the twenty-seventh day of July, 1894. Notice was also served on him on the fifteenth day of August, 1894, to select his homestead right in said land, and on said day Joseph Stinton signed in writing his selection of the northwest one-fourth of the northwest one-fourth of said section 34. On August 25, 1894, all of said land, except that selected by Mr. Stinton as

a homestead, was sold to the defendant W. F. Lohr, in satisfaction of his judgment, and a certificate of sale issued to him. At the time of these proceedings, neither of the defendants had any knowledge, actual or constructive, of said conveyance from Joseph Stinton to his wife. The district court decreed the execution sale valid as to the land in section 34 which was sold, and invalid as to all the land in section 28. The reason for holding the sale void as to the lands in section 28 was that it embraced the homestead of Joseph Stinton, and that the sheriff had failed to set it off to him.

II. The conveyance from Joseph Stinton to his wife was without consideration, and to hinder and delay creditors; and it is therefore void as to the creditors, and Mrs. Stinton took nothing under it, as to them. The plaintiffs took nothing by the conveyance from Mrs.

1 Stinton, except such rights as she, as widow, had in the land. Mrs. Stinton never had possession of the land by virtue of the deed to her; her possession was the possession of wife and widow only. Joseph Stinton being the owner of the land, was the proper person to be notified to select the homestead, and had the right, primarily, if not exclusively, to make the selection. *Ehrck v. Ehrck*, 106 Iowa, 614. It will be observed that the family was, and had been since 1889, residing on the land in section 28, and that Mr. Stinton's selection was of land in section 34, upon which the buildings in that section were located. "The homestead must embrace the house used as a home by the owner thereof, and if he has two or more houses thus used by him at different times and places, he may select which he will retain as his homestead." Code 1873, section 1994; present Code, section 2977. Clearly, the homestead must embrace the house used as a home, and none other can be selected; but,

if there are two so used either may be retained. The  
2 house in section 34 had not been used as a home by Stinton or his family for five years preceding the selection, and there is no evidence of a purpose to ever again

so use it; but, on the contrary, the family continued to live in section 28 long after this selection was made. The selection was not a choice between two houses used as a home, as but one was being so used, and it was not a selection embracing the house used as a home; therefore it was unauthorized and void. It is suggested that by so selecting, Mr. Stinton abandoned the homestead in section 28; but not so; surely not, as to the homestead rights of his wife. There being no valid selection of a homestead, it is as though none were made, and the sheriff should have caused the homestead to be set apart in the lands in section 28, so as to embrace the house then used by the owner as a home. The decree of the district court is correct, and is **AFFIRMED.**

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WILLIAM LAKE, Plaintiff, v. P. B. WOLFE, Judge, Defendant.

**Violation of Injunction: EVIDENCE.** In an action to enjoin defendant from building a partition fence between his house and that of plaintiff, some ten feet high, and within twenty inches from plaintiff's house, for the purpose of annoying the plaintiff, and darkening his windows, and making his property undesirable, a temporary injunction was obtained. Thereafter plaintiff set some posts next to the board fence nearest plaintiff's house, nailed scantlings to them on the side nearest the house, and nailed to the scantlings boards so as to make a high board fence, forty feet in length, and about twelve feet high. Boards were nailed to the scantlings in such a manner as to form a kind of a roof along the greater part of the fence, and boards were also nailed at the ends. *Held*, a violation of the injunction, though defendant claimed that the structure was not a fence, but a woodshed.

**REVIEW ON APPEAL.** *Certiorari* will lie to determine whether an injunction was violated, though the district judge has found that a contempt has not been committed.

SATURDAY, APRIL 8, 1899.

PROCEEDING by *certiorari* to review an order of the district court dismissing an application for the punishment

of one Noel for contempt in violating an injunction.—*Annulled.*

*Hayes & Schuyler* for plaintiff.

No argument for Defendant.

ROBINSON, C. J.—The record submitted shows the following facts: The plaintiff owns a lot in the city of Clinton on which there is situated a house, a part of which he occupies as a homestead. John B. Noel owns the lot adjoining on the west side, and occupies it, with the house thereon, as his homestead. Both lots front northward, and each house is about eighteen feet from the street. The distance between the houses is from ten to twelve feet; and the front end of the house of the plaintiff is twenty-two inches, and the rear end twenty inches, from the boundary line between the two lots. By virtue of an agreement between the plaintiff and Noel, the plaintiff erected a wire picket fence from the street to the line of his house, and from that line to the rear end of his house a close board fence, which was five feet high at the north end and six feet high at the south end. Noel continued the fence to the south end of the lots, at a height of six feet. The entire fence was built substantially on the boundary line. In July, 1898, the plaintiff filed in the district court of Clinton county a petition, making Noel a party defendant, in which it was alleged that Noel was threatening to remove a portion of the fence constructed by the plaintiff, and to build in lieu thereof a high, tight board fence, which was not needed, and would not be a partition fence, and which would cause irreparable injury to the property of the plaintiff; that the intent of Noel in building the fence was not to benefit himself, but to injure and annoy the plaintiff, darken his windows, and make his property undesirable as a residence. The plaintiff asked that Noel be enjoined from removing the partition fence, and from erecting any other fence in its place. At the time the petition was filed, an order for a temporary writ of injunction was obtained, and the writ was issued and served on Noel. Thereafter Noel filed



an answer, in which he denied that he had ever threatened or contemplated the removal of the partition fence, or of any part of it. In August, 1898, the plaintiff applied to the defendant in this case for an attachment against Noel on the ground that the latter had violated the injunction. Noel appeared, and there was a hearing on the charge of the plaintiff, Noel was adjudged to be not guilty, and the contempt proceedings were dismissed. For the purposes of this case, we assume that the order granting the temporary injunction was rightfully made. *Wise v. Chaney*, 67 Iowa, 73. We

are only to inquire whether the injunction was violated. That we are authorized to do so, notwithstanding the fact that the district judge found that a contempt had not been committed is settled by the cases of *Currier v. Mueller*, 79 Iowa, 316; *Lindsay v. Clayton District Court*, 75 Iowa, 509; and *Cotant v. Hobson*, 98 Iowa, 318.

The evidence submitted on the hearing of the charge of contempt shows beyond controversy, the following facts: Two or three months before the action for an injunction was begun, there was some trouble between the plaintiff and Noel, the nature of which is not disclosed. The day before the action was commenced, Noel placed upon his lot, in front of his house, posts, from fourteen to sixteen feet in length, boards from eight to ten feet in length, and scantlings sixteen feet in length. After the injunction was issued and served, Noel set four of the posts next to the board fence nearest to the plaintiff's house, nailed scantlings to them on the side nearest that house, and nailed to the scantlings boards so connected with the fence below as to make a tight board fence about forty feet in length, twelve feet high at the north end, and sloping to the south end, which is ten and a half feet in height. On Noel's lot three posts were set,—one at each end, and one opposite the middle of the fence described. The north post is four feet, and the south one three and a half feet from the fence. Scantlings two by four inches in size

were nailed to the fence at a height above the ground of eight and a half feet, and to the inner posts at a less height. Boards from packing boxes were nailed to the scantlings in such manner as to form a kind of roof along the greater part of the fence. There are also boards at the ends, but none on the west side. The part of the roof next to the fence is from two to three and a half feet lower than the top of the fence. There are three windows in the first story of the plaintiff's house which open westward, and the structure described is so placed that its north end is about five feet north of the north window, and the south end is about ten feet south of the south window. The effect of the fence is to darken the windows, to prevent the free circulation of air through them, and to obstruct the view from them. Noel claims that the structure was not a fence, but a woodshed, which he had a right to construct; and it appears that he has in it a few boxes, some wood, and window frames. He has a woodshed back of his house, which

2        was placed there when his house was erected. The claim that the structure in question is not a fence, within the meaning of the injunction, but a woodshed, is a mere pretense. The inner posts and the roof together brace and strengthen the fence, but it is clear that the structure was erected, not to provide storage room for Noel, but to obstruct the windows of the plaintiff, and that the part which Noel regarded as of chief importance, and for which the whole was built, was that which increased the height of the fence which had before existed. The entire structure erected by Noel constituted a fence, within the meaning of the injunction; and the defendant erred in adjudging that Noel had not violated the injunction, and was not guilty of contempt. If the injunction was wrongfully issued, he should have asked for its dissolution, but he violated it at his peril.

Questions which we have not referred to are discussed by counsel for the plaintiff, but, in the absence of an argument for the defendant, we follow our usual custom in such cases,—of not deciding questions which are not necessarily

involved in the determination of the case. For the reasons shown, the order of the defendant in dismissing the application of the plaintiff in the contempt proceedings is annulled, and further action in harmony with this opinion is directed.

—ANNULLED.

S. B. PAYNE v. THE CHICAGO & NORTHWESTERN RAILWAY  
COMPANY, Appellant.

**Crossing Accident: NEGLIGENCE.** A railroad company permitted the smoke of burning slack to obscure the track at a crossing, all of which plaintiff knew, but there was no evidence that this contributed to the accident. There were cattle guards and snow fences along the right-of-way, but they were properly constructed

1 and located. Plaintiff and four others did not hear the crossing whistle, but the engineer, and two others on the engine with him,

2 swore positively that the whistle was sounded at the distance

3 required by law (sixty rods), and the bell was set ringing. Four

4 others testified to hearing the crossing whistle. *Held*, that negligence was not shown, and this, though the high rate of speed

5 required the whistle to be sounded more than sixty rods from the crossing, since plaintiff, not having heard the signal that was given, would not have heard it had it been given sooner.

**CONTRIBUTORY NEGLIGENCE.** Plaintiff was driving an empty wagon, and had his head closely bundled up, and testified he listened, but heard no noise of an engine. He stopped two hundred yards from the crossing, and again at the edge of the right-of-way, and looked, and saw nothing coming. When he last looked the snow fence obscured the track, but had he looked after advancing a few feet

6 he could have seen the track for three-fourths of a mile. From the time he first looked till he reached the track the engine had time to travel to a point out of vision to the crossing. The engineer and superintendent on the engine testified that plaintiff looked over his shoulder, turned around, and hurried up his horses; that he was fifty feet from the crossing, and still had time to avoid being struck; that they whistled again, and the engineer testified that he then applied the air. Plaintiff was familiar with the crossing, and knew no train was scheduled to pass, this engine being an extra. *Held*, that plaintiff was guilty of contributory negligence.

*Appeal from Boone District Court.*—HON. S. M. WEAVER,  
Judge.

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SATURDAY, APRIL 8, 1899.

PLAINTIFF prosecutes this action to recover damages for personal injuries, and for injury to his property, caused, as is alleged, by the negligence of the defendant, and without fault or negligence on the part of the plaintiff. The defendant answered, denying generally, and, upon trial had, verdict and judgment for four thousand dollars were rendered in favor of the plaintiff. Defendant appeals.—*Reversed*.

*Hubbard, Dawley & Wheeler* for appellant.

*Whitaker & Dale* and *Edmund Nichols* for appellee.

GIVEN, J.—I. Appellant insists in argument on a reversal on four grounds, namely: That the evidence fails to show that the defendant was negligent in any of the respects charged; that the evidence does show that the plaintiff was guilty of negligence contributing to his injury; that counsel for the plaintiff was guilty of misconduct in the argument to the jury prejudicial to the defendant; and that the court erred in overruling the defendant's motion for a continuance.

As a disposition of the first two propositions involves a consideration of the evidence, we will state the substance and effect thereof, so far as material to the contentions: On the second day of December, 1895, the plaintiff, then residing some miles east of Boone, started west, on an east and west public highway, for that city, with a two-horse team and an empty farm wagon, with a double top box thereon, and a spring seat on top of the box. The day was clear, cold,  
1 and there was a strong wind from the northwest.

Plaintiff was "warmly covered up," had a woolen scarf around his head and ears, and a cloth cap on his head over the scarf, with the roll or band turned down over his ears. Thus wrapped up, and seated in the spring seat, he drove along towards the crossing at a trot, having full control of his team. The general direction of the defendant's

track for about two and three-fourths miles east of Boone is from southeast to northwest, and the highway upon which plaintiff was driving is due east and west. At a point about two miles east of Boone there is a north and south highway crossing the east and west highway six hundred and twenty-eight feet east of where that highway crosses defendant's track. The north and south highway crosses the track a short distance south of where it crosses the east and west highway, and six hundred and sixty feet southeast of where the east and west highway crosses the track. It will be observed that there were two railroad and highway crossings only six hundred and sixty feet apart. They are known as the "Twin Crossings." The east and west highway is north of the track until the crossing is reached, and from there west it is south of the track. It will be seen that the crossing of the east and west highway and the railroad track is at a sharp angle. The track, from a point about three-quarters of a mile east of the Twin Crossings, to Boone, is straight, with a slight down grade to the west. East of that point it curves out of view from one at or near the crossing. Immediately east of the crossing of the north and south highway and the railroad, the track passes through a slight cut, on the north side of which, and forming a part of the right of way fence, is a close board snow fence, three hundred and sixty feet long and eight feet high. There were whistling posts to the east for each of these railroad crossings, at the required distances.

2 Some months before December 2, 1895, the defendant had deposited a quantity of coal slack on its right of way west of the east and west highway. Some time previous to this accident this slack had ignited, and at times, especially when a high wind prevailed, threw off smoke that somewhat obscured the view, and caused horses to shy, in passing the crossing. The defendant had refitted an engine in its shops in Boone to be used in drawing a fast mail train, a service in which more than ordinary speed was required, and in which it was necessary that the engine should "run cool;" that is,

that the journals should not become heated so as to compel delay. In the forenoon of December 2, 1895, this engine, without any cars attached, was taken out by N. S. Tedrow, engineer, and A. L. Fenn, fireman, accompanied by F. G. Benjamine, road foreman of engines, and E. J. Taylor, foreman of the shops, for the purpose of testing its fitness for the fast mail service. The engine was run east from Boone to Ames, and then west to Boone. When running west, at a speed of from forty-five to sixty miles per hour, the engine struck the wagon in which the plaintiff was seated, when on said crossing of the east and west highway. By the collision the plaintiff received serious and painful injuries upon his person, the horses were killed, and the wagon so broken as to be of little, if any, value. The plaintiff was at the time familiar with that crossing, having crossed it frequently and recently, and with the team he was then driving. He knew of the presence of the snow fence, the burning slack, and was familiar with the time of the passing of scheduled trains, and that no train was scheduled to pass at the time he went upon the crossing.

II. The negligence charged against the defendant may be summed up as follows: That for a long time prior to the accident the defendant "had carelessly and negligently constructed cattle guards, fences, and snow barriers along and upon its right of way, and had dumped at said crossing a large quantity of slack coal, allowing the same to become ignited, burn, and smoke, all of which obscured the view of the defendant company's track and right of way to persons going in the direction traveled by said plaintiff at said time, and before reaching said crossing;" that said engine "was running, at the time plaintiff was struck and injured, at an extraordinary, unusual, and dangerous rate of speed, and the employes of said company failed and neglected to make the usual, necessary, and customary alarms and warnings of its approach towards said crossing, either by ringing the bell or blowing the whistle, until it arrived so near the plaintiff that

he could neither cross said track nor back off of the same in time to avoid said engine,—in all of which plaintiff alleges said company was negligent, careless, and failed to use proper and necessary care.” There is no evidence whatever tending to show that the defendant “had carelessly and negligently constructed cattle guards, fences, and snow barriers along and upon its right of way.” So far as appears, these structures were not only properly constructed, but were also properly located. While there is no evidence to support this charge of negligence, the fact of the presence of these structures is proper to be considered in determining whether the defendant was negligent in other respects charged. As to the burning slack, it is said there is no evidence that the defendant deposited it where it was, but, whether or not it did so, it certainly permitted the slack to remain. We think it may be inferred from the fact that the slack was upon the right of way that the defendant put it there. Now, while it may be that depositing slack near a highway crossing, and permitting it to burn and throw off smoke, so as to obscure a view of the crossing and of approaching trains, might be negligence, we find no evidence whatever that the plaintiff’s view was thus obstructed. He says he believes that he remembers that the slack was burning and smoking that morning. He says: “I cannot recollect whether I saw any smoke that morning of the accident at the crossing or not.” He nowhere says that his view was obstructed by the smoke, and the evidence of others, there at the time of the accident, or immediately after, leaves it beyond doubt that the smoke was not even remotely the cause of the accident. Plaintiff was familiar with the crossing, the presence of the burning slack, and had recently driven this same team over that crossing, and testified that he had the team under control at the time he approached the crossing. There is no evidence to support the charge of negligence in permitting the burning slack to be near the crossing, and that negligence was the cause of plaintiff’s injury.

III. The statute requires that the "whistle shall be twice sharply sounded at least sixty rods before a highway crossing is reached, and after the sounding of the whistle the bell shall be rung continuously until the crossing is passed." McClain's Code, section, 2003; present Code, section 2072. The evidence shows that whistling posts were placed sixty rods east of the Twin Crossings. In support of the charge that the defendant "failed and neglected to make the usual necessary and customary alarms and warnings," the plaintiff testified: "I never heard the train whistle; never heard the bell ring." Mr. Briley, who was driving to Boone on the same road, and some distance in the rear of plaintiff, and who lived near the railroad and was accustomed to hearing signals, says: "I cannot remember that I heard any signals whatever." Mr. Thompson, who was at his home near the Twin Crossings, says: "I don't remember hearing any whistle at all that morning. Don't recollect whether I heard any whistle or not." Mr. Cordell, who was at his home near the crossings, says: "I heard an unusual noise or whistling about the time, or just before they struck him. It was the alarm given; that is, the danger signal,—constant whistling. That is what attracted my attention." He was in his barn up to that time, and does not say anything as to the crossing signals. Mr. Nelson, called by the plaintiff, testified that he was sawing wood near these crossings. He says: "The whistle first attracted my attention. I heard the crossing whistle is all I noticed. When I noticed this whistle, the engine was up to Mr. Craven's somewhere." It is evident that the whistle referred to by this witness was the danger signal, given just before the collision. As against this,

2 we have the testimony of three of the men who were on the engine that the crossing signals were given at or near each of the whistling posts, and that the bell, which was rung by steam, was set ringing, and continued to ring until after the accident. N. S. Tedrow, the engineer, testified positively to the giving of these signals, and gives, as a reason



for remembering it, that his superiors were on the engine, and would soon have reminded him of the neglect if he had failed to give the signals. Miss Cordell, who was at her home, near the crossing, testified that she heard regular crossing whistle, and Mrs. Cordell testified that she heard the crossing whistle, and after that "I heard an alarm whistle,—continuous short whistling." She further says: "I could not say as to whether I heard two crossing whistles,—I would not be positive,—but I know I heard one, and am almost positive that I did the other, but I won't say as to that." Mr. Goess testified: "I remember to have heard a whistle for the crossing. Then, in a short time,—a few minutes,—I noticed another whistle." E. B. Cordell also testified that "he noticed the whistle at the crossing." The fact that plaintiff and others did not hear the crossing whistles sounded does not even create a conflict with this positive evidence that the signals were given at the whistle posts. It will be observed that the statute requires the whistle to be sounded "at least sixty rods before a highway crossing is reached." This distance is evidently prescribed in view of the fact that the time consumed in running sixty rods at usual railroad speed, will afford the traveler opportunity to avoid being upon the crossing. The court, having informed the jury as to the provisions of the statute with respect to crossing signals, instructed as follows: "If, however, by reason of the extraordinary speed at which the engine may be moved, or by reason of any known natural or artificial obstructions to the sight of persons using the crossing, it is found that a reasonable regard for the safety of such persons requires that such signals should be begun at a greater distance than sixty rods, then the omission so to do would be negligence." The court further instructed that if, by reason of such negligence, "the injuries complained of resulted to the plaintiff without fault on his own part contributing thereto, then he will be entitled to your verdict." There is no evidence that signals were given for the Twin Crossings except at or near the whistling posts, and, under the

evidence and the instructions, the jury was warranted in finding that the defendant was negligent in not sounding the signals more than sixty rods from the crossing.

5 We think, however, there is an entire absence of evidence to show that such negligence or omission was the cause of the injuries complained of. The plaintiff, for reasons that will hereafter appear, did not hear the crossing signals that were given at sixty rods, and certainly would not have heard them if given at a great distance. He did not hear those given because of the manner in which his hearing was obstructed by the wraps he wore, and it does not appear that he was at any time in a more favorable condition for hearing than when the signals were given at the whistling posts. If he would not have heard the signals if given at seventy or eighty or more rods from the crossing, then the omission to give them was not the cause of the accident.

IV. We now inquire whether the plaintiff was guilty of negligence contributing to his injury. Under repeated and undisputed holdings of this court, it was the duty of the plaintiff to look and to listen for trains before going on the crossing, and if, from any cause, he could not know, by looking or listening, while moving forward, whether or not a train was coming, he should have stopped until, by looking or listening, he did know that it was safe for him to cross. Though he was familiar with the time of trains, and knew that none were scheduled to pass there at that time, that did not excuse him from looking and listening, as the defendant had a right to run its engine, with or without trains, at any time. Three witnesses only testified to the manner in which plaintiff approached and went upon the crossing, namely, the plain-

tiff, the engineer, and Mr. Benjamine. The fireman,  
6 being on the south side of the cab, did not see the plaintiff until after he was struck. The plaintiff says he listened, but heard no signal nor noise of the engine; but he does not say that he stopped to listen to avoid the noise of his empty wagon, nor that he removed his cap, or the scarf

that was under it, from his ears. We can readily believe that, thus wrapped and driving along, he did not hear any signals or sounds from the engines, but certainly, with proper care, he might have heard the approach of the engine. If, however, his view was such that he could thereby know whether or not a train was approaching, he might be excused from stopping to listen and from removing his wraps. It is evident that, as to listening, the plaintiff did not exercise reasonable care. He testifies that he looked twice,—First, at Cordell's Corners; and, second, at the edge of the railroad right of way,—and did not see anything coming. He says that at Cordell's Corners "I just turned around my head this way and looked back, and drove ahead. I could not see no train in sight anywhere back of me." Cordell's Corners is six hundred and twenty-eight feet from the crossing, and it is apparent, from the gait at which plaintiff was driving (at a slow trot) and the speed of the engine, that the engine had not turned the curve so as to be in sight when plaintiff was at the corners and looked. He traveled from the corners to the north line of the right of way, over five hundred feet, without looking again. He says: "I drove along just about the edge of the railroad right of way, and there I looked back again, and I saw none. Didn't hear anything. Then I drove on." He further states that he has no recollection of what happened after that. The track was straight from the crossing for three-quarters of a mile to the east. The snow fence, eight feet high, stood upon an embankment at the cut immediately east of the north and south highway crossing. This fence ran lengthwise on the north line of the right of way. The only point at which the snow fence would obstruct one's view of the track to the east was on the north line of the right of way and west of the fence. At that point the fence was in the line of vision, and obscured a view of the track, but a step forward would bring the track into view. It was at that point that the plaintiff last looked, and, although the engine must have turned the curve before that time, he did not see it because of the snow

fence. He must have known of that obstruction to his view, and that to advance a few feet forward or backward would carry him beyond it, and into full view of the track, yet he checked his horses into a walk, and drove one hundred and fourteen feet onto the crossing, without looking again. Benjamine and Tedrow were in the north side of the cab. Benjamine standing behind Tedrow. Benjamine says: "When we came into the cut where the snow fence is, I saw Mr. Payne driving along, and I made the remark to Mr. Tedrow that he had better blow the whistle again, as I thought that man had not heard it, and he did blow the crossing signal again. I think we blew the whistle again, and Mr. Payne looked over his shoulder, and turned around, and raised up the reins of his horses like this, and his horses started in a high speed, or at least going faster than they were. They were trotting along when we first noticed them. It appears to me he urged his horses on. He urged his horses forward. They seemed to increase their speed at once after that." He further says: "At the time Mr. Payne looked back, and hurried his horses forward, there was time then for Mr. Payne to have avoided getting struck, if he had tried to. He was then at some little distance from the crossing yet,—probably fifty feet or more." Mr. Tedrow testifies that he saw Mr. Payne about the time he whistled for the second crossing. He says: "When I blew the alarm for the second crossing, Mr. Payne was approaching the crossing at common, ordinary trot. About the time I whistled for the second crossing, Mr. Payne looked back towards the east,—towards me,—over his left shoulder. Mr. Benjamine called my attention to him,—that he did not think he was going to stop,—and I grabbed the whistle again, and made another alarm, and he did not appear to stop, and I applied the air." What we have set out is the substance of all the testimony of these three witnesses on this subject, and, after a careful reading of the entire testimony, we think that but one conclusion can be fairly and reasonably reached from it; which is that the plaintiff did not exercise reasonable and

ordinary care in going upon that crossing. He did not listen, as was his duty to have done, and he did not look, when to have looked would have warned him of the danger. Familiar with the crossing, and relying upon the fact that no train was scheduled to pass at that time, he went thoughtlessly and recklessly forward, without looking or listening when and as he should have done. These conclusions render it unnecessary that we should consider the other points urged by appellant, namely, that the court erred in overruling its motion for a continuance, and that counsel for plaintiff were guilty of misconduct in the argument of the case.—REVERSED.

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BRIDGET PURCELL V. CHARLES V. LANG AND SAMUEL WALTERS, Appellant.

**Public Lands:** LAND WARRANT ENTRY: *Dower.* Where a married man moved on certain public lands, and entered the same under a land warrant, the dowable interest of his wife attached, which  
 1 could not be defeated except by conveyance or other execution or judicial sale, and the mere fact that a patent did not issue until after the husband alone had conveyed away the land is immaterial.

**SAME:** *Preemption.* Where a husband preempted land and paid for it by a land warrant, his wife acquired a dowable interest in the  
 2 land which could not be taken away by a conveyance made by her husband alone.

*Appeal from Howard District Court.*—HON. A. N. HOBSON, Judge.

SATURDAY, APRIL 8, 1899.

SUIT in equity in which plaintiff seeks to recover her distributive share of certain real estate said to have been owned by her deceased husband. Decree for plaintiff and defendant appeals.—*Affirmed.*

C. C. Upton for appellants.

H. T. & C. W. Reed for appellees.

DEEMER, J.—Plaintiff claims that her deceased husband, Joseph Purcell, pre-empted the land in controversy in 1855; that he afterwards transferred the land to one Solon M. Langworthy by a deed in which she did not join, and that she has never relinquished her interest therein, nor has the same been sold by execution or judicial sale against her husband; that defendants hold title to the lands by certain mesne conveyances from Langworthy, who furnished the consideration therefor, and that he (the husband) purchased the land from the general government in the year 1857, and paid for the same by a military bounty land warrant issued to one John King, by him assigned to Purcell (the husband), and by Purcell to Langworthy, on March 20, 1857; that, at the time the land was purchased, Langworthy was the owner of the warrant; and that plaintiff's husband never had any title to the land. Some matters material to the determination of this controversy are admitted, or established, by undisputed evidence. They are as follows: Plaintiff and her husband moved upon the land in question in the year 1855, and lived there, for a time at least, prior to the sale to Langworthy, April 20, 1857, and the records of Howard county show that the same were entered by Joseph Purcell April 20, 1857, land warrant No. 31,406. This land warrant was issued to John King, teamster, Q. M. Department, Ohio militia, Florida war, on the eighth day of July, 1856. It bears an assignment from King to Purcell dated March 5, 1857. The following certificate of location also appears in the record:

“Military Bounty Land Act of March 3, 1855. Register's Office. *Osage, April 20, 1857.* Military land warrant No. 31,406 in the name of *John King*, has this day been located by *Joseph Purcell* upon the northwest quarter of section 33 in township 98 N., of range 12 W., subject to any pre-emption claim which may be filed for said land within forty days from this date. *Jas. D. Jenkins*, Register.

"Contents of tract located, 160 acres.

"Pre emption Act 1841."

On the back of this certificate is the following assignment:

"For value received, I, *Joseph Purcell* (deeded *J. N. & H. W. Hart*, May 4, 1858), to whom the within certificate of location was issued, do hereby sell and assign unto *Solon M. Langworthy*, and to his heirs and assigns forever, the said certificate of location, and the warrant and land therein described, and authorize *him* to receive the patent therefor. Witness my hand and seal this 20th day of March, 1857. *Joseph Purcell*. [Seal.] Attest: *M. F. Patterson*.

"State of Iowa, County of *Mitchell*. On this 20th day of *March*, 1857, before me personally came *Joseph Purcell*, to me well known, and acknowledged the foregoing assignment to be his act and deed. And I certify that the said *Joseph Purcell* is the identical person to whom the within-named warrant was issued. Witness my hand and seal. [Seal.] *S. B. Chase*, Notary Public."

The italics in each instrument indicate the part that was in writing.

We also find the following receipt with the application of *Joseph Purcell*, and also the certificate of the register and receiver of the land office attached:

"Military Bounty Land Act of March 3, 1855. Land warrant No. 31,406. Register and Receiver's No. 8,318. Land Office, *Osage*, April 20, 1857. We hereby certify that the attached military bounty land warrant No. 31,406 was on this day received at this office from *Joseph Purcell*, of *Howard* county, and state of Iowa. *Jas. D. Jenkins*, Register. *A. K. Ealon*, Receiver.

"I, *Joseph Purcell*, of *Howard* county, state of *Iowa*, hereby apply to locate, and do locate, the northwest quarter of section No. 33, in township No. 98 north, of range No. 11 west, in the district of lands subject to sale at the land office at *Osage*, containing 160 acres, in satisfaction of the attached

warrant numbered 31,406, issued under the act of March 3, 1855. Witness my hand this 20 day of April, A. D. 1857. *Joseph Purcell*. Attest: *Jas. D. Jenkins*, Register. *A. K. Eaton*, Receiver.

"I request the patent to be sent to ———."

"Land Office, Osage, April 20, 1857. We hereby certify that the above location is correct, being in accordance with law and instructions. *A. K. Eaton*, Receiver. *Jas. D. Jenkins*, Register."

A patent was issued for the land by the general government to Joseph Purcell in February of the year 1860, pursuant to his entry or purchase in April, 1857. This patent was sent by the commissioner of the general land office to J. L. Langworthy & Bros., of Dubuque, Iowa, of which firm Solon M. Langworthy was a member. On April 20, 1857, Joseph Purcell conveyed the land by warranty deed to Langworthy for the expressed consideration of two hundred and eighty dollars.

Appellee contends that the assignment to Langworthy appearing on the back of the certificate of location under date of March 20, 1857, must have been made at a later date than the one named, for the reason that the certificate itself was not issued until April 20th of that year, and that, if this be not true, an assignment issued prior to the time of the completion of the purchase is void under section 2263 of the Revised Statutes of the United States. She further insists that the lands were pre-empted by her husband, and that the land warrant was accepted by the general government in payment of the land. She further insists that the land warrant was accepted in payment for the land, that it was not assigned until after the purchase was complete, and that she is entitled to her distributive share because she did not join in the deed to Langworthy. Some question is made as to the manner in which Purcell located the land. Plaintiff testifies that he acquired a pre-emption right, and some of the papers to which we have referred seem to sustain the claim. But there is



also much to be said in favor of the proposition that he located under the land warrant only, and had or made no claim to pre-emption right. We do not think it necessary to determine the truth with reference to this matter, although we incline strongly to the belief that the land was located under the warrant, and not in virtue of any pre-emption claim. The controlling question in the case is, when was the assignment of the pre-emption right or of the land warrant in fact made? It seems to us there can be no question that it was not made until after the certificate of location was issued, for the assignment is of the certificate of location, the warrant, and the land. This must have been on or after April 20, 1857. There is no evidence of any other assignment than the one to which we have referred, and it is very plain that this could not have been executed on March 20, 1857, for that

1 was prior to the time the certificate of location was made. As soon as Joseph Purcell effected the purchase of the land, plaintiff had a dowable interest therein which could not be defeated except by conveyance or through execution or judicial sale; and the mere fact that a patent did not issue until after the conveyance to Langworthy is wholly immaterial. *Wirth v. Branson*, 98 U. S. 118; *Stinson v. Geer*, 42 Kan. 520 (22 Pac. Rep. 586); *Key v. Jennings*, 66 Mo. 356. If it be conceded that Purcell pre

2 emptied the land and paid for it by the land warrant, the result is the same, for there is no evidence whatever that the land warrant was assigned before its acceptance by the general government in payment for the land. That acceptance was made on the twentieth day of April, 1857. We are confirmed in this conclusion by the fact that, if Purcell pre-empted the land, he was required to file an affidavit that he had not made a contract by which the title he acquired should inure in anywise to the benefit of any person except himself. His entry, if one was made, was on the twentieth day of April, 1857, and we will not presume that he committed perjury in order to sustain defendant's claim. Another

significant fact is that the deed to Langworthy recites a consideration of two hundred and eighty dollars, and there is no evidence that this was not paid. An assignment of a pre-emption right before payment of the purchase price which might be made with land warrant (Rev. St. U. S. sections 2277, 2278) is declared null and void by statute. Rev. St. U. S., section 2263; *Olson v. Orton*, 28 Minn. 36 (8 N. W. Rep. 878).

Defendant's claim that there was a resulting trust in Langworthy, and that the deed made to him was in execution of the trust, is largely answered by what we have already said. There is absolutely no evidence, save that to which we have referred, that Langworthy furnished the consideration for the land, and that, as we have seen, is insufficient. Plaintiff has a dowerable interest in the land, to which she has made no relinquishment, and the trial court correctly ordered the admeasurement of her distributive share.—AFFIRMED.

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A. L. SHARP V. W. B. ARNOLD, Appellant.

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137	552

**Liquor Nuisance: CESSATION BEFORE ACTION.** An action to enjoin a liquor nuisance will not lie where the evidence is uncontradicted that, for some time prior to the beginning of the action, defendant had ceased to sell liquor. In this case no stock of liquors was retained and no government tax paid.

*Appeal from Dickinson District Court.*—HON. W. B. QUARTON, Judge.

SATURDAY, APRIL 8, 1899.

ACTION to enjoin a nuisance caused by the sale of intoxicating liquors. From a decree granting the relief prayed, the defendant appeals.—REVERSED.

*Cory & Arnold* for appellant.

*St. Clair & Reigard* for appellee.

WATERMAN, J.—The defense in this case is that no nuisance existed at the time this action was begun. The original notice was served September 8, 1897, and the petition was filed on the twenty-fifth day of the same month. The evidence shows the sale of beer by defendant on the premises at different times, the last of which was July 4, 1897. Defendant was a witness, and testified, in substance, that he had ceased selling intoxicating liquors prior to the commencement of this action; that the last sale was the one spoken of, in July. This testimony is in no way controverted. If no nuisance existed when the action was brought, plaintiff was not entitled to a decree. As tending to support this proposition, see *Shear v. Brinkman*, 72 Iowa, 699; *State v. Severson*, 88 Iowa, 714. In *Judge v. Kribs*, 71 Iowa, 183, relied upon by plaintiff, the defendant claimed to have ceased selling after the action was begun. We do not wish to be understood as holding that, in order to warrant an injunction, actual sales must be shown up to the date of the action to enjoin. But we do say that there must be some evidence of the existence of the nuisance at that time. If, in addition to the sales shown in this case, there had been evidence that defendant kept a stock of liquor, and had it on hand, when the action was brought, or that he paid the special tax to the United States government for the sale of intoxicating liquor after July 4, 1897, or if he had continued to maintain a place fitted for the sale of liquor, there would in either such case have been some evidence to show that his claim of voluntary abatement of the nuisance was a mere pretext to avoid a decree. But there was no such evidence. It is not enough to justify a decree, to show that the defendant at some time in the past has violated the law which is here invoked. The decree must be REVERSED.

## THE STATE OF IOWA v. M. SNYDER, Appellant.

**Illegal Sale of Liquor Bills of Lading.** A banker selling bills of lading at his bank to whoever might apply, thereby enabling the  
1 purchasers to obtain intoxicating liquors at a freight depot, is guilty of selling the liquors; such dealings precluding him from asserting that he was a mere collecting agent for the consignors of the liquors.

**NUISANCE:** *Defendant owning neither liquor or building.* He is also guilty of maintaining a nuisance defined as using a building in  
2 which intoxicating liquors are sold unlawfully, though he owned neither the building nor the liquors.

*Appeal from Poweshiek District Court.*—HON. D. RYAN, Judge.

SATURDAY, APRIL 8, 1899.

INDICTMENT for keeping a liquor nuisance. From a verdict and judgment of guilty, defendant appeals.—*Affirmed.*

*D. W. Norris and W. R. Lewis* for appellant.

*Milton Remley, Attorney General, and J. W. Carr, County Attorney,* for the State.

DEEMER, J.—Defendant is accused of using a building or place in Poweshiek county for the purpose of unlawfully keeping and selling certain intoxicating liquors therein, and of unlawfully selling intoxicating liquors therein. He is a banker at Grinnell, and as such is charged with having made the sales in question. There is evidence tending to  
1 show that various dealers in intoxicating liquor living in Chicago and Rock Island, Illinois, and Oskaloosa, Iowa, shipped intoxicating liquor to Grinnell, Iowa, consigned to themselves. Bills of lading were issued, showing that the shippers were consignees, and these bills, accompanied by sight drafts, were forwarded to the defendant. The

108	205
109	539
108	205
127	346

drafts were drawn upon various parties, who were ostensibly residents of the city of Grinnell. Some of these parties called upon the defendant, paid their drafts, and received bills of lading for the goods. Armed with this evidence they would go to the railroad depot, and receive the liquors which were consigned by the aforesaid liquor dealers. Some of the witnesses testified that they went to the bank and asked for a bill of lading; that defendant said he had bills for different prices, and asked them which they wanted; that, upon witness indicating his choice, defendant would accept the money, turn over the bill of lading for the goods, and that witness would then go to the railroad depot and get a box of whisky. Some of them said that they had ordered no liquor, and had received no notice from the shipper that any liquor had been sent; and, if these witnesses are to be believed, it is apparent that no notice was taken of whom the drafts were drawn upon, or of any of the usual formalities incident to the collection of a bill of exchange. Whoever called, and was willing and able to pay the price, was accommodated, and received his bill of lading, after indicating how much he was willing to pay. We say there is evidence tending to show these facts, and the jury were justified in finding them to be true, although the defendant insists that he had no other connection with the transaction than simply as a collecting agent. Defendant kept no liquor at his bank. It was all at the depot, awaiting proper presentation of bills of lading before delivery.

It is contended in argument that, while it may be true that defendant was guilty of selling intoxicating liquor, he was not guilty of maintaining a nuisance, and that the jury should have been so instructed. The crime of nuisance consists in the keep or use of a building or place in which intoxicating liquors are kept with unlawful intent, or are sold for forbidden purposes. It is the use of a place in which the inhibited acts are done, rather than the doing of these acts, that constitutes the offense. Now, with the practical concession that there was sufficient evidence to

justify the defendant's conviction of the crime of selling intoxicating liquors contrary to law, or of keeping such liquors with intent to sell the same unlawfully, the only question for solution is, did the defendant keep or use a building or place for that purpose? The authorities furnish no uncertain answer to this proposition: In the case of *State v. Arnold*, 98 Iowa, 253, it is said: "It, of course, is to be understood that it is not necessary to prove that the defendant was the owner, or even that he was a lessor under a formal lease. It is sufficient if he is shown to have been maintaining a nuisance, and the ownership, or even the rightful possession, of the property, is not a material question." Again, in *State v. Briggs*, 81 Iowa, 585, the defendant kept a blacksmith shop in which he gave orders for liquor upon the railroad company, and upon which he received the liquor. In passing upon that case we said: "Without holding that a sale in one place, and a delivery in another, would make the place where the sale was made a nuisance (which question we in no manner determine), we do say that it was proper to show the use to which the shop was put, in connection with the keeping and selling of liquors, as bearing on the question whether or not it was being maintained as a nuisance." In the case of *State v. Viers*, 82 Iowa, 397, we further said: "If one house is used for the sale of intoxicating liquors which are kept in another, there can be no doubt that both are nuisances. If the liquors were kept in a house not occupied by the defendant, yet sold in a house occupied by him, he was guilty of committing a nuisance by making sales of liquor." We have further held that one may be guilty of nuisance, although he owned neither the liquor nor the place where the same was sold. *State v. Herselus*, 86 Iowa, 214. In that case we said: "The purpose prohibited is keeping for sale or selling intoxicating liquors in violation of the law of the state. The defendant was concerned, engaged, and employed in keeping liquors in that place for that purpose, and therefore was using the place for a purpose prohibited by the preceding section,"

From these citations it clearly appears that use of a building or place for the prohibited purpose rendered it a nuisance, although the party charged owned neither the liquors nor the place. In this case the court instructed the jury as follows: "A building in which intoxicating liquors were in fact sold unlawfully, or in which intoxicating liquors are kept for the purpose of sale or exchange unlawfully, is a nuisance, and, in order to make out the offense, the presence of intoxicating liquors is essential and necessary. If one house is used for the sale of intoxicating liquors which are kept in another, there can be no doubt but both are nuisances. If the liquors were kept in a house not occupied by the defendant, yet sold in a house occupied by him, he was guilty of committing a nuisance by making a sale of liquors." This instruction seems to be in accord with the law as announced in the foregoing cases, and, as there was ample evidence upon which to base such a charge, there was no error.

No complaint is made of the court's ruling denying defendant's application to require the state to elect as to which building it claimed was the nuisance, and, as the indictment did not more particularly describe the building than to say it was in Poweshiek county, the defendant was properly convicted if the jury found he kept a nuisance in either the railroad depot or the banking house. We discover no error in the record, and the judgment is **AFFIRMED**.

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STATE OF IOWA V. MIKE COHEN, Appellant.

- Circumstantial Evidence:** INSTRUCTIONS. Where the evidence is wholly circumstantial, an instruction that the jury need not be satisfied beyond a reasonable doubt of each link in the chain of
- 1 evidence relied on to establish guilt, it being sufficient if, taking the testimony all together, they are satisfied of guilt beyond such doubt, which instruction is repeated in substance, and no where
  - 3 limited or explained, is erroneous, as authorizing a conviction though an essential fact be not proved beyond a reasonable doubt. Such a charge is not equivalent to an instruction, that is not incumbent on the state to prove beyond a reasonable doubt every

108 208  
1108 73

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4109 744  
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135 279

circumstance offered in evidence and tending to establish a fact essential to conviction.

**SAME.** While it is not necessary that each essential fact in the chain of circumstances solely relied on to connect the accused with the  
1 commission of the offense, when separately considered, should be found beyond reasonable doubt, yet if conviction depends entirely  
2 on different circumstances arranged linkwise, each and every link must be established beyond a reasonable doubt.

**SAME.** Such instruction is also erroneous as requiring the jury to  
4 pass on each fact separately.

**REASONABLE DOUBT.** An instruction defining a reasonable doubt as one that the jury are able to give a reason for is erroneous, as, in  
5 effect, placing the burden on defendant to furnish reasons for acquittal and as requiring jurors to give a reason for their conclusion.

**SECONDARY EVIDENCE.** In a prosecution for arson, a copy of a copy of an insurance policy covering the burned property is not admissible as secondary evidence, where no reason is shown for not  
6 introducing the copy from the original.

*Appeal from Blackhawk District Court.*—HON. A. S. BLAIR,  
Judge.

SATURDAY, APRIL 8, 1899.

FROM a judgment convicting him of the crime of arson, the defendant appeals.—*Reversed.*

*Mullan & Pickett* for appellant.

*Milton Remley*, Attorney General, and *S. B. Reed* for the State.

LADD, J.—The evidence was wholly circumstantial. The court, as the eleventh paragraph of the charge, gave this instruction: "The ruling requiring the jury to be satisfied beyond a reasonable doubt of the defendant's guilt, in order to warrant a conviction, does not require that the jury should be satisfied beyond a reasonable doubt of each link in the chain of evidence relied upon to establish the defendant's guilt. It is sufficient, if, taking the testimony all  
1 together, the jury are satisfied beyond a reasonable  
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doubt that the defendant is guilty." What the court doubtless intended to say was that it was not incumbent on the state to prove beyond reasonable doubt every circumstance offered in evidence, and tending to establish facts essential to conviction. If so intended, it would have been a correct statement of the law. And we may go further, and say that it is not necessary that each essential fact in the chain of circumstances solely relied on to connect the accused with the commission of the offense, when separately considered, be found beyond reasonable doubt. Such a fact, though having little to sustain it when standing alone, may derive such support from others immediately connected therewith as to exclude all doubt of its existence. Nevertheless, if conviction depends entirely on different circumstances, arranged linkwise, connecting the defendant with the crime charged, then each and every one of these must be established beyond a reasonable doubt; for no chain can be stronger than its weakest link. *Commonwealth v. Webster*, 5 Cush. 295 (52 Am. Dec. 711); *People v. Phipps*, 39 Cal. 333; *Crow v. State*, 33 Tex. Cr. R. 264 (26 S. W. Rep. 209); 2 Thompson Trials, 2511; Rice Evidence, p. 766; *People v. Aikin*, 66 Mich. 400 (33 N. W. Rep. 821); *Kollock v. State*, 88 Wis. 663 (60 N. W. Rep. 817). Not so, however, with the minor circumstances relied on by the state to establish the ultimate and essential facts upon which conviction depends. Some of these may fail of proof, and yet those essential to conviction be found from other evidence beyond reasonable doubt. But the linked arrangement of fact to fact, in cases of circumstantial evidence, is not always discernible. A guilty person is quite as frequently hemmed in by a throng of circumstances. As said in *Leonard v. Territory*, 2 Wash. 381 (7 Pac. Rep. 878): "Release from a chain comes when the weakest link gives away, but escape from a crowd does not necessarily depend on the presence or absence of one or another, or even, perhaps, the greatest number, of the individuals composing it."

If the jury could only have understood, from the phrase "link in the chain of circumstances," that such fact or circumstance was referred to as might tend to establish the ultimate facts and circumstances upon which conviction depended, then, though not approving of the use of metaphors in instructions, an exception would not be well founded. But the connection in which it was used does not require that construction, and we deem it the more likely to have been thought by the jury to refer to facts or circumstances essential to conviction, and which, according to all the authorities and sound reasoning, must be established beyond reasonable doubt. This instruction has been repeatedly condemned as erroneous by other courts. *State v. Furney*, 41 Kan. Sup. 115 (21 Pac. Rep. 216); *State v. Gleim*, 17 Mont. 17 (41 Pac. Rep. 998); *Marion v. State*, 20 Neb. 233 (20 N. W. Rep. 294, 289; 29 N. W. Rep. 911); *Graves v. People*, 18 Colo. Sup. 170 (32 Pac. Rep. 66, 63); *Leonard v. Territory*, *supra*; *People v. Aikin*, *supra*; *Clair v. People*, 9 Colo. Sup. 122 (10 Pac. Rep. 799). The reasoning in the last case is so concisely and perspicuously stated, that we quote with approval: "This figure of speech may perhaps be correctly applied to the ultimate and essential facts necessary to conviction in criminal cases, since, if one be omitted, or be not proven beyond reasonable doubt, an acquittal must follow. It is not true, however, that each and every of the minor circumstances introduced to sustain these ultimate facts must be proven with the same degree of certainty. Some of these circumstances may fail of proof altogether, and be discarded from consideration by the jury, yet the ultimate fact, to establish which they were presented, may be shown beyond a reasonable doubt. The evidence in cases similar to the one before us has been more aptly likened to a cable. One, two, or a half dozen strands may part, yet the cable still remain so strong that there is scarcely a possibility of its breaking. \* \* \* It is true, in a sense, that every circumstance, however trivial, offered by the state in evidence, is relied upon; but it is true, in a

broader sense, that the state relies upon the ultimate facts or circumstances, the establishment of which is absolutely essential to conviction. We deem it quite as reasonable to suppose that the jury misunderstood and misapplied the language used, as that they comprehended its appropriate meaning and application." The supreme court of Illinois seem to have approved the instruction in *Bressler v. People*, 117 Ill. 422 (3 N. E. Rep. 522, 8 N. E. Rep. 62), when first before it but on reconsideration, it was pronounced inaccurate, though held to have done no harm. The charge was larceny of a note from a justice of the peace named Smith. The defendant testified that he paid it, and Smith thereupon delivered it to him, while the latter swore it had never been paid, and was not delivered. Circumstances were then proven tending to support the testimony of each, and this evidence is that to which the instruction must have been applied; that is, as said by the court, "only evidentiary facts tending to corroborate other evidence." In *Bradshaw v. State*, 17 Neb. 147 (22 N. W. Rep. 361), the instruction was held, in view of

others not set out, not to refer to matters essential to  
3 be found in order to convict. Here the error is  
emphasized by repetition, in substance, though in  
different language, in the eighteenth paragraph of the charge;  
and by none is its meaning limited or explained. In *State v. Hayden*, 45 Iowa, 17, the following instruction was held to  
have been properly refused: "As the evidence in the case  
is wholly circumstantial, you must be satisfied beyond reasonable doubt of each necessary link in the chain of circumstances to establish the defendant's guilt." Such a metaphor, as we have seen, is not accurate, and is calculated to  
confuse, rather than enlighten, a jury. Nor should  
4 the jury be required to pass on each fact separately,  
though absolutely essential to conviction. On these  
grounds, and the further one that the rights of the accused  
were fully protected by the instruction given, the decision in  
that case may securely rest. It is there said: "It is not a

reasonable doubt of any one proposition of fact in the case which entitles to an acquittal. It is a reasonable doubt of guilt, arising upon a consideration of all the evidence in the case." This is no more than stating the rule that the facts should not be isolated and separately passed upon, but that all must be considered together in determining the main issue. This fully appears from subsequent cases. In *State v. Stewart*, 52 Iowa, 285, an instruction was condemned which advised the jury that it would be sufficient if one of the material averments of the indictment were "fully and clearly proven." In *State v. Hennessy*, 55 Iowa, 301, the court did not instruct that certain facts must be established beyond reasonable doubt, and it is said: "If the jury, in considering the whole case, have reasonable doubt upon any essential ingredient of the offense, this entitles a defendant to an acquittal, because it generates a doubt of guilt; and the general instruction upon reasonable doubt which is usually given need not be repeated in each instruction which relates to the facts of the case." In *State v. Clark*, 102 Iowa, 691, an instruction authorizing the jury to base the finding of certain facts on a preponderance of the evidence was held erroneous, though in another portion of the charge the court directed that all the material allegations of the indictment must be established beyond reasonable doubt. An examination of these cases demonstrates that this court has gone no further than to hold that the jury should not be required to pass on the essential facts separately, and that the general instruction with reference to the finding of guilt beyond reasonable doubt is sufficient. See *Tompkins v. State*, 32 Ala. 569.

II. Nor can we approve the fifth instruction as a safe definition of reasonable doubt: "By 'a reasonable doubt,' as herein instructed, is meant a doubt such as a reasonable man might entertain, after a careful review of all the evidence in the case, as to the guilt of the defendant.

5 In a legal sense, a reasonable doubt is one which has some reason for its basis. It does not mean a doubt from mere caprice or groundless conjecture. A reasonable

doubt is such a doubt as the jury are able to give a reason for." The last clause is the one to which exception is taken. Who shall determine whether able to give a reason, and what kind of a reason will suffice? To whom shall it be given? One juror may declare he does not believe the defendant guilty. Under this instruction, another may demand his reason for so thinking. Indeed, each juror may in turn be held by his fellows to give his reasons for acquitting, though the better rule would seem to require these for convicting. The burden of furnishing reasons for not finding guilt established is thus cast on the defendant, whereas it is on the state to make out a case excluding all reasonable doubt. Besides, jurors are not bound to give reasons to others for the conclusion reached. *Siberry v. State*, 133 Ind. Sup. 677 (33 N. E. Rep. 681); *Cowan v. State*, 22 Neb. 519 (35 N. W. Rep. 405); *Morgan v. State*, 48 Ohio, 371 (27 N. E. Rep. 710); *Carr v. State*, 23 Neb. 749 (37 N. W. Rep. 632). In *People v. Stubenvoll*, 62 Mich. 329 (28 N. W. Rep. 883, a similar instruction was disapproved, but it was held, in view of the rule of that state, dispensing with any definition of the term, of no practical consequence in the case. We are still quite content with the definition contained in *State v. Ostrander*, 18 Iowa, 435, and the long line of cases following it.

III. A copy of a copy of an insurance policy covering the burned property was received in evidence over appellant's objection, after his failure, on due notice, to produce the original. No reason appears for not introducing  
6 the copy made from the original, and, in the absence of some showing for such omission, it was error to receive a copy made of the copy therefrom. See *Drumm v. Cessnun*, 58 Kan. 331 (49 Pac. Rep. 78); *Winn v. Patterson*, 9 Pet. 663.

IV. We discover no other error assigned, likely to arise on another trial. The instructions held to be erroneous were taken from Sackett's Instructions to Jurors. They derive no support from any of the cases in courts of last resort there cited.—REVERSED.

PETER SMITHBERG *et al.* v. M. L. ARCHER *et al.*, and S. J. GUERDET, Appellant.

108	215
116	48
116	46
116	47

**Sale for Mulet Tax: ESSENTIAL PREREQUISITES.** A sale for a mulet tax is void, where the supervisors failed to levy the tax, as required by Acts Twentieth General Assembly, chapter 62, section 9, in view of section 10, making the auditor's certificate of such levy the treasurer's authority for collecting the tax.

*Appeal from Emmet District Court.*—HON. W. B. QUARTON, Judge.

SATURDAY, APRIL 8, 1899.

THE plaintiff's mortgage was established as a lien on the north half of lots 3 and 4 in block 58 of Estherville. Archer claimed the north third of these under a tax deed issued in 1897. Guerdet held a certificate of sale of the north half of the lots, issued December 6, 1897, for nine hundred and sixty-eight dollars and fifty-three cents mulet tax, penalties, and costs appearing on the treasurer's books at the time of the sale. Kane, who held the fee, operated a saloon on the north half of lot 4 from March, 1895, till August 20, 1897. His bond was duly filed, with Guerdet as surety, and he paid the mulet tax for 1895 and that for 1896, except fifteen dollars. The sale was for this fifteen dollars and the tax of 1897 and penalties. The assessment was made by the assessor in March, 1895, and upon its return to the auditor the latter officer advised the treasurer thereof, and orally authorized him to enter it on the mulet-tax list. This the treasurer did, and so entered it each year. No other or different assessment was made, and there was no levy by the board of supervisors. Decree was entered declaring the certificate of sale to Guerdet void, and quieting the title in Archer. Guerdet appeals.—*Affirmed.*

*B. E. Kelley and Geo. E. Clarke* for appellant.

*E. A. Morling* for appellee Archer.

*Soper, Allen & Penn* for appellee Smithberg.

LADD, J.—It may be conceded for the purposes of this case that, inasmuch as the property was assessable, the failure of the assessor of Estherville to return the assesment cannot be taken advantage of after the sale. The general law relating to assessment, levy, and collection of taxes is made applicable to the mulct tax by section 13 of chapter 62 of the Acts of the Twenty-fifth General Asssembly, and it would seem that under section 1398 of the Code the treasurer may assess, in event of an omission by the assessor to do so, and that under the following section no question concerning mere irregularity, without more, may be raised after the sale. *Lathrop v. Irwin*, 96 Iowa, 713. But section 9 of this act expressly provides that the board of supervisors shall levy the mulct tax (*Hubbell v. Polk County*, 106 Iowa, 618), and section 10 that, when this is done, “the county auditor shall, upon the levy made as aforesaid, certify the same forthwith to the county treasurer with names of persons and property, and amount of tax, and a statement of the costs that have accrued either before the board of supervisors or in the district court, and said certificate and list shall be full authority for the treasurer to enter the same upon the tax books of the county and proceed to collect the same.” No levy of such a tax by the board of supervisors is directed by Code, section 2436, *et seq.* But under the act referred to it was made obligatory on the board, and only when so made might the auditor certify the lists to the treasurer. This alone was the treasurer’s authority for collecting the tax. The act then required, rather than dispensed with, the levy, and without this the sale was void. *Iowa Railroad Land Co. v. Woodbury County*, 39 Iowa, 173; *Moore v. Cooke*, 40 Iowa, 290; *Scott v. Union*

*County*, 63 Iowa, 584; *Ellis v. Peck*, 45 Iowa, 114; *Early v. Whitingham*, 43 Iowa, 162; *McCready v. Sexton*, 29 Iowa, 356; *Hintrager v. Kiene*, 62 Iowa, 605.—AFFIRMED.

TOLLERTON & STETSON COMPANY, Appellant, v. A. G.  
ANDERSON, THE NORTHWESTERN STATE BANK, and  
A. J. HOGAN *et al.*

108	217
113	668

**Foreclosure of Chattel Mortgage: SALE AT RETAIL.** Under a chattle mortgage on a stock of merchandise authorizing a foreclosure by  
1 private sale either in bulk or by single article, the mortgagee may, in the absence of bad faith, sell at retail in the ordinary course of business.

**RIGHTS OF JUNIOR: Estoppel.** A junior chattel mortgagee cannot complain that the senior mortgagee, in foreclosing, sold the goods  
1 for country produce instead of for cash, where the produce was converted into cash and credited.

**SAME.** Where a junior chattel mortgagee advised the senior mortgagee in foreclosing to keep up the stock, and sold to him merchandise to be resold in connection with the mortgaged goods, he  
2 cannot complain of the senior mortgagee's making purchases and reselling in connection with the sale of the mortgaged stock; and, at any rate, cannot thereby obtain priority, or have the senior mortgage invalidated.

**DELIVERY: Estoppel.** A junior chattel mortgagee, whose mortgage  
5 is by its terms made subject to the senior mortgage, cannot complain that the latter was not delivered until after his own had taken effect

**RELEASE OF HOMESTEAD: Marshal ing assets.** A junior chattel mortgagee was not prejudiced by the senior mortgagee releasing a  
4 mortgage for the same debt on the mortgagor's homestead, because  
6 resort to the homestead to satisfy the debt would not have been permitted until after the exhaustion of the other security.

**BOOK ACCOUNTS: Expense of collection.** Where a chattel mortgage on book accounts authorized the mortgagee to collect them, and  
7 the latter employed an agent to do so, the agent's reasonable commissions for making the collections were properly allowed as expenses of the foreclosure.

**CONSTRUCTION OF MORTGAGE.** A chattel mortgage on the fixtures  
8 and furniture in a store, used in carrying on a merchandise business, includes a safe.



*Appeal from Sioux District Court.*—HON. F. R. GAYNOR,  
Judge.

SATURDAY, APRIL 8, 1899.

ONE John Ring, engaged in doing a general merchandise business at Hawarden, became financially embarrassed, and to secure his creditors executed a chattel mortgage on his stock of goods to the defendant A. G. Anderson, another to the Northwestern State Bank, and still another to plaintiff, on the same property, and also covering books of account. Plaintiff's mortgage was made, by its terms, subject to the other mentioned mortgages on the stock, and also subject to a mortgage to one Hogan on the books of account. Anderson and the Northwestern State Bank took possession of the stock of goods under their mortgages, and proceeded to sell the same for the payment of their respective debts. Hogan took possession of the book accounts, and collected the same to satisfy his claim. The contention here, briefly stated, is that Hogan's mortgage is invalid as against plaintiff, and that the other mortgagees have proceeded in such an irregular manner as to make themselves liable as for a conversion of the mortgaged property, or at least to render themselves liable to account for the value of the goods, which, it is said, is much more than what was realized. The prayer of plaintiff is that its mortgage be foreclosed, that defendants be required to account, and that plaintiff's lien be decreed superior to that of either of the defendants named. There were some other issues which we shall set out in the course of the opinion. The district court entered a decree of foreclosure on plaintiff's mortgage, but denied the other claims made. Plaintiff appeals.—*Affirmed.*

*Shull & Farnsworth* for appellant.

*G. W. Pitts* for appellees Anderson and the Northwestern State Bank.

WATERMAN, J.—There is no dispute as to the original order of priority of these liens. It is as we have stated.

The mortgages under which possession was taken contained a clause "that in case of default made in the payment of the above-mentioned promissory note, \* \* \* or whenever the said mortgagees shall choose so to do, then, in that case, it shall be lawful for said mortgagee or his assigns, by himself or agent, to take immediate possession of said goods and chattels, wherever found, \* \* \* and to sell the same at public auction or private sale, and either in bulk or by single article, and with or without notice. \* \* \*"

It is insisted that this did not confer power to sell  
1 at retail in the ordinary course of trade; and that was what was done. In *Johnston v. Robuck*, 104 Iowa, 523, it is said that a sale at retail, under a power quite similar in terms, is not unlawful where bad faith is not shown. And we may say there is nothing in the case at bar to indicate bad faith on the part of defendants.

It is further charged that, in selling these goods, defendants took country produce in exchange. The produce received amounted, in all, to some forty or fifty dollars. It was converted into cash and so credited up. The result is such that no just ground of complaint is afforded.

During these sales, in order to keep up stock, defendants purchased small quantities of oil, from time to time, which they sold and accounted for, and this action is made the subject of attack. We do not think plaintiff is in any situation to criticise this course, for it advised the purchase of goods to replenish the stock, and, if we correctly understand the record, it sold one bill of sugar to the mortgagees while they were in possession. But if all these things had been done without authority, the effect would not be to give plaintiff's mortgage priority over those of Anderson and the bank. All that could be claimed by the junior lienholder would be that defendants must account for the value of the goods. *Chaffee v. Lumber Co.*, 43 Neb. 224 (61

N. W. Rep. 637). Some of the goods taken by the defendants were destroyed by a flood, for which it does not appear they were in any way responsible. Including this amount, three hundred and twenty-eight dollars and eight cents, and we think the value of the goods taken has been fully accounted for.

II. Plaintiff claims an iron safe as not included in the mortgages to Anderson and the bank. The descriptions in these two mortgages are practically the same. Both cover the stock of merchandise, giving the location of the building wherein it is contained, and then in each follows this clause: "Also all the fixtures of every kind, and furniture of every kind owned by me and used in and about said store and in carrying on said business." The safe was used in the store in connection with the business. Under the rule announced in *Brody v. Chittenden*, 105 Iowa, 524, the safe is included in the term "furniture," as found in these instruments.

III. Next, as to the Hogan claim. It seems that Hogan had a mortgage on the homestead of Ring; that the chattel mortgage on the book accounts was made to him at the time of the execution of the other mortgages, without his knowledge, and was delivered to a third party for him. This person had no authority from Hogan to receive it. Shortly after this, Hogan came upon the scene, representing another creditor, Lindeke, Warner & Schurmeier. Hogan accepted the chattel mortgage, released his mortgage on the homestead, and induced Ring to execute another mortgage on the homestead to Lindeke, Warner & Schurmeier to secure their claim.

A number of reasons are assigned for assailing Hogan's lien on book accounts. *First*, it is said there was no delivery of his mortgage until after plaintiff's mortgage took effect. In our opinion, plaintiff is in no position to urge this claim, because its mortgage was expressly made, by its terms, subject to the mortgage to Hogan.

Again, it seems to be claimed that appellant has acquired some rights as against Hogan because of his release of the mortgage on the homestead. The doctrine of marshalling assets is sought to be invoked. But this does not  
 6 obtain except when it can be enforced without injustice to the creditor. Hogan could not have been compelled, nor indeed would he have been permitted, to resort to the homestead, until his other security was exhausted. *Dickson v. Chorn*, 6 Iowa, 19; *Linscott v. Lamart*, 46 Iowa, 312.

Finally, it is said the court erred in allowing commission for the collection of the accounts. Hogan, it seems, gave the accounts to an agent to collect. This he had a right to do.

The agent charged for his services, and the amount  
 7 was reasonable. We think the allowance was proper.

These charges are not in the nature of attorney's fees, but rather come under the head of expense of foreclosure. It is true, the accounts might have been put up at public sale, but the expense of this would have been as much or more than was incurred by the plan pursued, and the amount realized would quite likely have been less. Beside these considerations, we may add that Hogan's mortgage gave him express authority to collect the amounts.

Some other questions are presented, relating to the amounts allowed by the court for expense of selling the merchandise. We discover no error in the court's action in these respects.—AFFIRMED.

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KLASS UBBINGA V. THE FARMERS' SAVINGS BANK, Appellant.

108	221
139	341

**Price of Notes:** PRESUMPTIONS. An agreement to purchase "four 1 notes," each given for a sum stated, is an undertaking to pay therefor the face value thereof.

**Savings Banks:** DEBT: *Powers*. Under McClain's Code, section 1796, authorizing savings banks to purchase notes, such a bank can

9 make a contract for the purchase of notes, assuming such a contract to be a debt, notwithstanding a statutory provision prohibiting such banks from contracting any debt except for deposits and necessary expenses of management.

*Appeal from Lyon District Court.*—HON. JOHN F. OLIVER,  
Judge.

SATURDAY, APRIL 8, 1899.

ACTION upon a contract to purchase promissory notes.  
Judgment for plaintiff, and the defendant appealed.—  
*Affirmed.*

*Parsons & Riniker* and *L. Vogt* for appellant.

*E. C. Roach* for appellee.

GRANGER, J.—I. The action is upon the following contract: "We agree to purchase from you four notes, of three hundred dollars each, made by Lewis Beldt and wife to you, and dated January 1st, 1897, the notes to be sold to us on the following dates: One February 1st, 1897; one July 1st, 1897; One November 1st, 1897; one December 1st, 1897,—said notes being secured by mortgage on real estate. Farmers' Savings Bank, by O. C. Collman, Cash." The petition shows a breach of the contract by defendant in refusing to purchase the notes. It further shows a mistake in the execution of the contract, in that the agreement was that defendant was to pay for each note the amount of the face value thereof, and that such agreement was, by mistake, omitted from the written contract, and plaintiff asks that the contract be so reformed as to include such agreement, and a specific performance is asked. The answer is a denial, except as to the corporate character of the defendant bank, and contains a plea that the defendant is disqualified by law from  
1 assuming such an obligation. Most of the appellant's argument is devoted to the sufficiency of the evidence to warrant a reformation of the written contract, but we think

the question may be disregarded, because, under the terms of the contract as expressed, its undertaking was to pay the face value or amount of the notes. Each note expressed its value in dollars and cents, which is the measure of value, and was an obligation for the payment of so many dollars and cents. Had the notes been wrongfully converted, without evidence to change the presumption, the law would fix the damages,—which would be their value,—the amount or face value thereof. *Latham v. Brown*, 16 Iowa, 118; *Sadler v. Bean*, 37 Iowa, 439. That plaintiff understood he was to have the face value there is no doubt; and that defendant so understood, or, at least, should have so understood, there is no doubt. If the parties did not understand the agreement alike, it comes within the provisions of Code, section 4617.

II. The law as to savings banks provides that they shall not contract any debt except for deposits and the necessary expenses of managing and transacting their business, and it is urged that the obligation in question created a debt. Another provision of the same law expressly authorizes such a bank to “discount, purchase, sell and make loans on commercial paper, notes, bills of exchange, drafts or any other personal or public securities.” McClain’s Code, section 1796. It will

2 be seen that the law authorizes the purchase of notes, and if the bank has that power, it must have the right to make the agreement therefor, and it seems to us that it would be an unwarranted construction of the law to say that such an agreement might not be executory. Such a power would seem very essential in the ordinary transaction of business. It may be doubtful if the word “debt” in the statute is intended to embrace more than an express obligation to pay money; but that we do not, and need not, decide. We are clearly of the opinion that the statute authorizing the purchase of notes gives the right to make the contract in question. The judgment is **AFFIRMED**.

108 224  
1108 453  
108 224  
9121 47

VERONA H. WELCH V. THE UNION CENTRAL LIFE INSURANCE COMPANY, Appellant.

**Life Insurance: FRAUD: Estoppel.** Under McClain's Code, section 1759, providing that the certificate of health issued by an insurance company's medical examiner shall estop the company from setting up the defense that the assured was not as healthy as required by the policy when issued, "unless the same" was procured by fraud, the company may set up the defense that the certificate, and thereby the policy, was secured by fraud, regardless of whether the examiner was deceived.

**SAME: Construction of policy.** Where one clause of an insurance policy provides that the application, which contains a provision that the facts therein stated are warranted to be true and that they shall constitute the basis of the policy to be issued, is a part of the policy, and a subsequent clause provides that, "except as hereinbefore provided," the policy "shall be incontestable for any cause except misstatement of age," the company may contest a recovery under the policy for fraudulent representations in the application as to the health of the applicant, by virtue of which the policy was issued.

**SAME.** A life insurance policy providing that it "shall be incontestable for any cause except misstatement of age," may nevertheless be contested for fraud entering into it.

**EVIDENCE: Admissions of insured.** In an action on a life insurance policy, where the defense is fraudulent misrepresentations as to health, the insurer may prove statements made by insured touching his health at about the time of, before, and after the issuance of the policy.

**Transfer to Equity:** Fraud is triable at law. Therefore, when such is alleged, it is not error to refuse transferring the whole cause to equity, though cancellation of a writing obtained by fraud, be prayed.

*Appeal from Cedar Rapids Superior Court.*—HON. T. M. GIBERSON, Judge.

SATURDAY, APRIL 8, 1899.

PLAINTIFF, the beneficiary named in a policy of life insurance issued by the defendant on the twenty-first day of

March, 1896, on the life of Otis S. Hogg, brings this action at law to recover three thousand dollars, with interest, on said policy; alleging the death of said assured on the first day of June, 1896, that proofs thereof were duly made, and that the defendant refuses payment; wherefore judgment is asked. The defendant answered, admitting that it issued the policy; that the assured died; that proof of his death was made; that it refuses payment; and alleges, as defense, that the issuing of said policy was procured by fraud, which allegations will hereafter more fully appear. The defendant prays to be dismissed, with costs, and for "a decree rescinding the said application and policy, and that the defendant have general and equitable relief." In an amendment, the defendant alleges that the only consideration received from the deceased for said policy was thirty-three dollars and twenty-six cents in cash, and two promissory notes for thirty-three dollars and twenty-six cents each; that no administration had been taken out on the estate of the deceased; that there is no legal representative of his estate to whom defendant can surrender said money and notes; wherefore defendant brings the same into court, to be delivered to the person legally entitled thereto. The defendant moved to transfer the case to equity, which motion was overruled. Plaintiff replied, saying that the defendant is estopped from contesting the policy upon the facts alleged in its answer, and because, through its medical examiner, it knew the physical health and habits of the assured. The case was called for trial to a jury, and at the close of all the testimony the court sustained plaintiff's motion for a verdict for the amount claimed, and rendered judgment therefor. The defendant appeals.—*Reversed.*

*Ramsey, Maxwell & Ramsey and Smith, Kirk & Smith* for appellant.

*Jamison & Smyth and C. W. Kepler* for appellee.



GIVEN, J.—I. Appellant moves to strike appellee's additional abstract on the grounds that the denial of appellant's abstract is not sufficiently specific, and that the matter set out in the additional abstract is not necessary to this appeal. We do not think there is any substantial merit in this motion, and it is therefore overruled.

II. Appellant first complains of the overruling of its motion to transfer the cause to equity. The defense of fraud in procuring the contract is conceded to be available in an action at law, but it is insisted that the prayer for  
1       cancellation of the policy and application calls for the exercise of equity powers. The motion was to transfer the entire case; but, as the issue of fraud was properly triable at law, there was no error in overruling the motion.

III. The original application, signed by the assured, the medical examiner's certificate of health, and the policy have been certified for our inspection; and, generally speaking, we may say that they are in the form in common use. Of the matters appearing therein it is only necessary that we mention the following: The application is in two parts; the first giving in detail the name and residence of the applicant, name of the beneficiary, amount of insurance desired, etc., and contains the following: "It is hereby agreed  
2       and warranted that, should the company issue a policy upon this application, its interests shall not be affected by verbal statements made to its agents or others, or by the knowledge of such agent, but that it shall be affected only by the statements herein made (including those made to the medical examiner), which are hereby warranted to be true, full, and correct as facts, and they shall constitute the basis of any policy which may be issued hereon." In part 2 the deceased stated, in response to printed questions, that he was in sound health, that he never had consumption, spitting blood, habitual prolonged cough, and that he never employed a physician; and, in conclusion, declared as follows: "I

hereby further declare that I have read and understand all the above question put to me by the medical examiner, and the answers thereto, and that the same are true, and that I am the same person described as above; and I hereby warrant that there is not, and there has not been, any concealment of facts regarding my past and present state of health and habits of life, or my personal history." It is provided in the policy that the application is made a part of the contract, and that the policy "is issued and accepted subject to the benefits, provisions, and conditions contained on the second page thereof, which are made a part of this contract." Among the conditions enumerated on the second page is the following: "Except as hereinbefore provided, this policy shall be incontestable for any cause except misstatement of age." It is alleged in the answer that the statements made by the deceased, in his application, that he was in sound health, that he had never had consumption, spitting blood, habitual or prolonged cough, and had never employed a physician, were false and fraudulent, were known to the applicant to be false and fraudulent, and were so made to mislead, deceive, and defraud the defendant; that, at the time of said application and the issuance of said policy, said applicant was not in sound health; that he was, and had been for a long time, suffering from consumption, was subject to spells of spitting blood, had an habitual and prolonged cough, had employed a physician, and was continually receiving medical treatment.

IV. Appellant assigns as error the sustaining of appellee's motion for a verdict, the grounds of which may be summed up as follows: (1) The defendant has failed to establish any defense. (2) Because the policy in suit is incontestable, for the reasons alleged in the answer. (3) Because it appears, from the certificate of health of the examination of deceased, that he was at the time of said examination in sound health. (4) Because defendant has failed to show any evidence tending to impeach said certificate, or to show that it, or the policy, was obtained by fraud of the

deceased. This motion was not well taken as to the first and fourth grounds, as there is evidence tending to support the defense of fraud as alleged. The evidence is in marked conflict as to the physical condition of the assured at the time the policy was issued, and, so far as the evidence is concerned, the issue of fraud should have gone to the jury.

V. We next inquire as to the effect to be given to the certificate of health on the defendant's right to make the defense of fraud. Acts Sixteenth General Assembly, chapter 55, section 2 (McClain's Code, section 1759), provides as follows: "In any case where the medical examiner,  
3 or physician acting as such, of any life insurance company or association doing business in the state shall issue a certificate of health or declare the applicant a fit subject for insurance, or so report to the company or association, or its agent under the rules and regulations of such company or association, it shall be thereby estopped from setting up in defense of the action on such policy or certificate that the assured was not in the condition of health required by the policy at the time of the issuance or delivery thereof, unless the same was procured by or through the fraud or deceit of the assured." Appellee insists that the words "the same" refer to the certificate, and that the defendant must show, not only that the statements of the applicant were false and fraudulent, but that the examiner was deceived thereby. While the certificate may be competent and valuable as evidence, it is not a part of the contract, though the policy was issued in reliance thereon and upon the application. If the certificate was fraudulently procured, and the defendant was thereby deceived into issuing the policy, surely the policy, as well as the certificate is not conclusive against the defendant as to the condition of the assured's health, if it, and thereby the policy, were secured by fraud, as alleged in the answer. The defendant is not estopped by this certificate from setting up the defense pleaded, and the certificate of itself affords no reason for ordering a verdict for the plaintiff.

VI. The second ground of the motion for a verdict presents the question whether this contract of insurance may be contested for fraud of the assured, as alleged in the answer, in procuring it. If it may not, then no available  
4 defense was presented, and the plaintiff was entitled to a verdict; but, if otherwise, the case should have been submitted to the jury on the issue of fraud. Incontestable clauses in policies of life insurance are variable, some being absolute in form (that is, providing that the policy is incontestable at any time, or for any cause), others are qualified (as, that they are incontestable after a certain time, or after the death of the assured, or for other than particular causes named). The clause under consideration is of the latter class, and is among those enumerated on the second page of the policy, and made a part thereof. It is that, "except as hereinbefore provided, this policy shall be incontestable for any cause except misstatement of age." It is thereinbefore provided that the application is a part of the contract, and in his application the applicant warranted his statements therein "to be true, full, and correct as facts," and agreed that "they shall constitute the basis of any policy which may be issued hereon." In view of these things being thereinbefore provided, should it be said that the right to contest is limited to "misstatement of age?" Under a familiar rule, all parts of this contract must be construed together, and, if possible, effect given to the whole. It is also the rule that policies "must be liberally construed in favor of the insured, so as not to defeat, without a plain necessity, his claim for indemnity; and when the words used may, without violence, be given two interpretations, that which will sustain the claim and cover the loss should be adopted." *Goodwin v. Association*, 97 Iowa, 233. To hold this policy incontestable for the fraud alleged is to deny any effect to said warranty and agreement of the applicant, while to hold otherwise gives full effect to all parts of the contract. The words "except as hereinbefore provided" certainly contemplate that

the policy may be contested for some other cause than misstatement of age. If the policy may never be contested for fraud in its procurement, why include the warranty and agreement in it? Surely, we should hesitate to cancel and ignore these important features of the contract. If we may say that the words "except as hereinbefore provided" have reference to said warranty and agreement, the policy, by its terms, may be contested for the breach of that warranty; and, thus viewed, the contract does not admit of two constructions, and effect is given to all its parts, and violence done to none. We are influenced somewhat to this conclusion by what will be hereafter said as to the right to contest for fraud. It is true, as contended, that specifying a cause for which contest may be made excludes all other causes; but, as we view this policy, the words "except as hereinbefore provided" show that some other cause than misstatement of age was contemplated.

VII. Another, and probably more conclusive, reason why this defense may be asserted, is that fraud vitiates every contract into which it enters. In Bliss Insurance, section 247, it is said: "An agreement that an insurer will not raise any objection, even in case of direct personal fraud, is a void condition. It has even been questioned whether it would not be sufficient to render the policy itself wholly void *ab initio*, as an illegal contract. In these cases, then, fraud, if  
5 not mentioned, must be assumed to be excluded, since that construction is always to be preferred which will support a contract, and it is never to be supposed that the parties to it intend an illegal stipulation where a lawful meaning can be given to their words. Of course, this construction cannot make the policy really indisputable, for it leaves open the question whether the statement or omission complained of was fraudulent or not, and also what is the true meaning or construction of the policy itself." This statement of the law is fully supported in all of a large number of cases which have been examined, and disputed in none. There are cases

wherein the policy provided that it should be incontestable for any cause, or for certain causes, after a specified length of time, and others providing that the policy should be incontestable after the death of the assured. Such provisions are held to be in the nature of a statute of limitation or repose, and that, as the parties may stipulate as to the time when action may be brought, so they may stipulate as to the time within which certain defenses may be asserted. Such stipulation did not condone the fraud, but limited the insurer to a time within which it might assert the fraud as against the contract. In these cases the right to defend on the ground of fraud within the time agreed upon is recognized. Of this class of cases we refer to *Wright v. Association*, 43 Hun. 61; *Association v. Robinson*, 104 Ga. 256 (30 S. E. Rep. 919). An able article upon this subject, in which the leading cases are referred to, will be found in 45 Central Law J. 425. Our conclusion is that the court erred in sustaining appellee's motion for a verdict.

VIII. On the trial, appellant, in support of its defense, offered evidence as to the declarations and statements of the insured touching the condition of his health, about the time of and before and after the issuing of the policy, which, on appellee's objection, was excluded. These 6 rulings, and others complained of, seem to have been based upon the conclusion that the policy was incontestable for fraud. This defense being well pleaded, we think the evidence as to declarations of the assured touching his health were competent, and should have been admitted. See 1 Greenleaf Evidence, section 102; *Gray v. McLaughlin*, 26 Iowa, 279; *Blair v. Madison County*, 81 Iowa, 313. For the errors pointed out, the judgment of the district court is REVERSED.

HENRY WORMLEY *et al.* v. THE BOARD OF SUPERVISORS OF  
WRIGHT COUNTY, IOWA, *et al.*, Appellants.

**Drainage Petition:** "ADJACENT OWNER" DEFINED. "Adjacent owners," within Code 1878, title 10, chapter 2, requiring a petition for a ditch to be signed by "a majority of persons resident in the county, owning land adjacent to such improvement, \* \* \* setting forth the necessity of the same," are the owners of land abutting on the improvement, and not the owners of all the land within the congressional subdivision through which it runs.

ROBINSON, C. J., and WATERMAN, J., dissenting.

*Appeal from Wright District Court.*—HON. B. P. BIRDSALL,  
Judge.

SATURDAY, APRIL 8, 1899.

CERTIORARI to the defendant board to review its proceedings relative to the assessment and levy of taxes for the construction of a ditch under the provisions of the statute. The ditch in this case is the same as that in question in the case of *Aldrich v. Paine*, 106 Iowa, 461, and the facts are the same, so they need not be repeated. Among the illegalities alleged against the action of the board of supervisors is that of want of jurisdiction to order the construction of the ditch. The district court determined that the board was without jurisdiction, and avoided its proceedings, and from the judgment the defendants appealed.—*Reversed.*

*Peterson & Humphrey* and *J. W. McGrath* for appellants.

*Nagle & Nagle* for appellees.

GRANGER, J.—The issues present two jurisdictional questions as to the authority of the board of supervisors to order the construction of the drain or ditch. One is as to the

authority of the board to order its construction through the incorporated town of Clarion, and the other is as to the sufficiency of the petition presented to the board invoking its action in the premises.

The first question—that of the authority of the board to order its construction, in part, within the incorporated limits of the town—was settled in the case of *Aldrich v. Paine*, in favor of the jurisdiction of the board. These proceedings were had under the law as it was before the present Code, and is found in Code 1873, title 10, chapter 2; the chapter being, “Of Levees, Drains, Ditches and Water-courses,” for the construction and changing of which the board of supervisors is given authority under prescribed conditions. A jurisdictional requirement is that there shall be first filed in the office of the county auditor “a petition signed by a majority of persons resident in the county, owning land adjacent to such improvement \* \* \* setting forth the necessity of the same, the starting point, route, and terminus.” It is undoubted that such petition is a condition precedent to the authority of the board to act, and one of the grounds upon which the plaintiffs seek to set aside the order of the board of supervisors in ordering the ditch in question is that no such petition was presented. A petition was presented. Its sufficiency is what is questioned, in that it was not signed by the requisite number of land owners. We understand the controversy to be this: If the law simply requires a majority of the owners of the land actually adjoining or abutting on the improvement, then the petition was properly signed. But if, in case of a congressional subdivision of land, a part has been sold that abuts on the improvement and another part does not, the owner of the land not abutting must be included in the number, then the petition was not properly signed. The situation of this case in this respect is this: The petition, as the law required, was placed in the hand of an engineer, who reported that the proposed ditch would pass through certain congressional subdivisions



of land, which were actually a part of the town of Clarion, and subdivided into blocks and lots. It is appellees' thought that, as the subdivisions are adjacent to the improvement, all parts thereof, by whomsoever owned, are adjacent, within the meaning of the statute, so as to be included in the number of which a majority must sign the petition. We do not think that is the law. We realize that the word "adjacent" does not at all times mean adjoining or abutting; but it is many times so used, and the purpose of its use is to be known from the context. Synonyms of the word are "abutting," "adjoining," "attached," "beside," "bordering," "close," "contiguous," "neighboring," "next," and "nigh." The object of the petition is to invoke the action of the board; and, as notices are required, after the proceedings are commenced, to all owners of land along the route of the proposed ditch, before action is taken, other than to trace out the line of work, and get information as to what lands will be affected by it, and how, no reason appears for requiring the petition to be signed by more than a majority of those presumably directly interested, because their land must be affected by the improvement, favorably or otherwise. The object of the petition is to show at least apparent necessity for the improvement, and put the law in operation. As to the parties not owning abutting lands, but owning lands in the abutting subdivisions, there is no more reason for regarding them as adjacent owners than of so regarding other owners of land, just as near the improvement, who may be as much, or more directly, affected by the improvement.

Again, it is not properly to be said that the report of the engineer as to lands through which the improvement will be located is a guide as to who are adjacent owners, within the meaning of the law as to who shall be so classed for the purpose of petitioning, because the petition must be signed before he acts, and the copy is in his possession when he acts. Any other rule would involve great uncertainty in such proceedings; for if we depart from a rule that "adjacent owners"

means those owning land abutting on the improvement, and take any of the other definitions of the word "adjacent," as "near," "nigh," "neighboring," or "close," what reasonable rule can a board of supervisors have to determine the fact of its jurisdiction? The language employed in *Richman v. Board*, 70 Iowa, 627, wherein the term "interested in the work" or "improvement" is used, must not be understood as including "adjacent owners," as the term is herein defined. This holding settles the case in favor of the jurisdiction of the board of supervisors, and the judgment of the district court must be REVERSED.

ROBINSON, C. J., dissents from so much of the foregoing opinion as approves and follows the case of *Aldrich v. Paine*. WATERMAN, J., unites in the dissent.

EARL WHEELER, by his next friend, J. A. WHEELER, v. CITY OF BOONE, Appellant.

108	235
113	745

**Negligence: SIDEWALKS: Tricycles.** One injured while riding a tricycle on a sidewalk can recover only if the city was negligent in failing to keep the sidewalk in suitable condition for people to walk over, and he, while riding the tricycle, exercising due care, was injured because of such neglect.

108	235
116	650

**KNOWLEDGE OF CITY: Jury question.** Testimony that a defect in a sidewalk had existed for about two months and strong testimony on part of persons who used the walk, and who ought to have known of a defect if it existed, that they did not know of it, leaves the knowledge of the city a jury question.

108	235
118	420

**Instructions and Evidence: FUTURE PAIN.** Submission to the jury of the question of future pain, in action for personal injuries, is error; there being no evidence that there would be any, and plaintiff seeming at the time of the trial to be well of his injuries, so far as they would cause him pain.

**Ordinance: CONSTRUCTION: Bicycle and tricycle.** An ordinance against the use of sidewalks by "all varieties of vehicles known by the general term "bicycles," or one providing that no one shall "lead, ride, or place any beast of burden or vehicle on any sidewalk," other than going in or out of premises, or one prohibiting riding

or driving other than between the curb lines of a street, has no application to a tricycle operated by hand for the convenience of one unable to walk.

*Appeal from Boone District Court.*—HON. D. R. HINDMAN,  
Judge.

SATURDAY, APRIL 8, 1899.

ACTION for personal injuries. Judgment for plaintiff,  
and defendant appealed.—*Reversed.*

*Whitaker & Dale* for appellant.

*R. J. Jordan* for appellee.

GRANGER, J.—I. The plaintiff, Earl Wheeler, is a boy fourteen years of age, and is afflicted by a stiffening of the muscles and joints, through what is called "callositation." Because of this, he is moved about on a tricycle. About April 8, 1897, he was going to school with his brother, a boy two years his junior, to draw or push the tricycle; and on one of the walks of defendant city, because of a defect in the walk, he was thrown from the tricycle and injured; and this action is for the damage suffered. The walk on which the accident occurred was four feet in width, made of boards placed on three stringers. The defect, as shown, was in one of the boards, about eight inches wide, being broken, so that on one side of the walk it was from one and a half to two inches below the surface; and, when stepped upon, it would go down, and then spring back, so as to be as we have described. This was at a place where the walk descended in the direction the boys were going; and it appears from their testimony that they were going quite fast down the hill, and the younger brother, who had been pulling the vehicle with a rope, because of its speed left the front, and went behind it to hold it back; and, just as he reached there the front wheel went into the hole in the walk and Earl fell out and was injured. It is urged to us that the evidence does not justify a finding of negli-

gence on the part of the city, nor that the boy was injured because of the defect in the walk. We cannot agree with appellant as to either. We would be better satisfied with a finding for the city on both questions, but it is not to be well said that there is not a substantial conflict, as to both propositions, in the evidence. As to the condition of the walk, and how long it had been out of repair, there was affirmative proof that the walk had been for some time—two months or less,—in the condition we have described, so that the city, in exercise of ordinary care, would have known it. There is a strong showing from those who used the walk, and ought to have known of the defect, if it was there, that they did not know of it; but, with the affirmative proof of the fact, this want of knowledge does not destroy the conflict. As to how the injury occurred, the boys both say the wheel of the tricycle went into the hole, and Earl was thrown out. It is true, they do not agree as to some particulars that might be considered in weighing the evidence, but nothing so overcomes their statements as to nullify the finding of the jury.

II. The city has an ordinance prohibiting the use of its sidewalks of "all varieties of vehicles known by the general term 'bicycles.'" Defendant offered the ordinance in evidence, and it was rejected, and rightly so, for it was immaterial; a tricycle not being a bicycle. Nor are they known by the general term "bicycle." It is probably true that both are vehicles, but the ordinance is not against the use of vehicles, unless they come under the general term "bicycle."

III. The court also rejected, as evidence, an ordinance as follows: "Whoever shall lead, ride, or place any beast of burden, or vehicle on any sidewalk or footway, otherwise than going in or out of premises owned or occupied by himself or his employer, or shall allow the same to stand or remain upon any street crossing, to the inconvenience of persons, shall be deemed guilty of a misdemeanor." The ruling was right. There is no more reason to think the ordinance was intended

to prohibit the use of a tricycle, as this was made, than the use of a baby cab, or invalid chair on wheels. It is very clear that it has no reference to vehicles used and propelled by individuals, like bicycles or tricycles. The court also excluded an ordinance prohibiting riding or driving other than between the curb lines of the street, but the ordinance was manifestly intended to prohibit riding or driving beasts other than between the curb lines. This conclusion arises from construing the several provisions together. The ordinance as to bicycles was evidently intended to cover the subject of vehicles of the general nature. Whatever may be said as to general rules of law prohibiting vehicles, including bicycles, on sidewalks, we have yet to learn of any general or local law prohibiting the use of carriages operated by hand on sidewalks for the convenience of those unable to walk; and no law should be given such effect by construction.

IV. The court instructed that while the city was required to keep its walks in reasonably safe condition for pedestrians exercising reasonable care, it was not required to keep them in safe condition for people riding thereon in tricycles, and, as the accident in this case occurred while the plaintiff was on a tricycle, the liability of the city must be tested by the same rule that would obtain had plaintiff  
3      been walking, and then been injured; that is, if the city was negligent in failing to keep the walk in suitable condition for people to walk over, and plaintiff, while riding on the tricycle, in the exercise of due care, was injured because of such neglect, he could recover. We think the rule a correct one. It differs from the oft-expressed rule only in this: that persons who have a right to ride on the sidewalks in such vehicles may rely, the same as footmen may, on the walks being in a suitable condition for people to walk over, and have the same rights in case of injuries resulting from neglect. Such a rule places no additional burden on the public, and seems to be just as to the individual.

V. A complaint as to the fourteenth instruction given by the court is without merit. There is also a complaint as to the fifteenth instruction given. After verdict, the court permitted plaintiff to so amend the petition as to claim damages for future pain and suffering. The court had, by its instructions, already permitted such recovery, if the jury found for plaintiff, and error is now assigned on the giving of the instruction; and it is said the evidence was not such as to warrant the amendment, or a recovery for mental and physical pain in the future, unless the allegation of permanent injury would, by implication, include that of future pain. The petition contains no such averment, and, in argument, appellee attempts to sustain the instruction as given on that theory. The petition contains an express allegation of physical and mental pain which plaintiff has suffered, but no averment that he will so suffer in the future. The case seems to have been tried on that theory, except as to the instruction given by the court; and it does not appear that the parties had in view such an issue until the question arose after verdict, when, to meet the conditions, the amendment was filed. The case is to be reversed, and what we have said will be sufficient to avoid any difficulty on another trial on this branch of the case. It is explicitly charged in argument that there is no evidence as a basis for a recovery for future pain, and appellant sets out the evidence to show that there could be no such recovery. Appellee in no way attempts to meet this, and we find no evidence on which damages of this character could rest. So far as we find evidence bearing on that question, it is against even a probability of such suffering.

4     ing. It is true that he will suffer pain because of his former ailment, and would without his injuries complained of. If there is any evidence from which it could be found that the injuries would increase his suffering after the trial, we do not discover it; and we think, if there was such it would have been, in view of appellant's claim, pointed out. The injury was early in April, and the trial was the first

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days of October following, when he seemed to be well of his injuries, in so far as they would cause him pain. It is true that there remained a permanent enlargement of the bone of the leg, but it does not appear that it would be painful. For the error in submitting the question of future pain and suffering, the judgment must stand REVERSED.

REPORTS  
OF  
CASES AT LAW AND IN EQUITY  
DETERMINED BY THE  
SUPREME COURT  
OF  
THE STATE OF IOWA  
AT

DES MOINES, MAY TERM, A. D. 1899,

AND IN THE FIFTY-THIRD YEAR OF THE STATE.

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T. LANE and GEORGE CONSIGNNEY, JR., v. JOHN PARSONS and  
ANN E. PARSONS, Appellants.

**Land Sale:** DEFICIENCY IN TRACT: *fraud*. An owner of a tract of land, which, according to the government plat, contained a certain number of acres, but, according to fixed boundaries, contained much less, conveyed it in gross, describing it as certain fractional quarters of the government survey, the grantee knowing it had been so originally surveyed. The grantor made no covenant or representation as to the number of acres in the tract, except that he merely stated his belief that, if resurveyed according to the original field notes, it would contain the number of acres as therein shown. *Held*, that the grantee was not entitled to recover for a deficiency.

**Appeal:** PARTIES RELIEVED. Where plaintiff's petition and defendant's counterclaim are dismissed, and the latter only appeals, the former cannot be given any relief.



*Appeal from Webster District Court.*—HON. B. P. BIRDSALL,  
Judge.

TUESDAY, MAY 9, 1899.

PLAINTIFFS commenced a suit in equity to reform a deed made to them by defendants of an hotel property in the city of Fort Dodge, and to recover the amount of a special assessment for curbing and guttering, levied against the property conveyed. Defendants filed a counterclaim for the amount of an unearned premium for insurance upon the property, which, it is claimed, plaintiffs agreed to pay; and also for damages for deficiency in the number of acres in a tract of land they received from plaintiffs in exchange for the hotel property. They pleaded that they exchanged properties on the basis that plaintiff's land contained seven hundred and seventy-eight acres, whereas in truth it contained but six hundred and thirteen, and that plaintiffs falsely and fraudulently represented there were seven hundred and seventy-eight acres in the tract, to their damage. Each party denies the claims of the other, and on these issues the cause was tried to the court, resulting in a decree dismissing plaintiffs' petition and defendants' counterclaim, and defendants appeal.—*Modified and affirmed.*

*Wright & Wright* for appellants.

*Soper, Allen & Morling* and *Botsford, Healy & Healy*  
for appellees.

DEEMER, J.—Defendants, who were the owners of an hotel property, situated in the city of Fort Dodge, which was incumbered by mortgage in the sum of three thousand dollars, and against which a special assessment had been levied for the sum of four hundred and seventy-eight dollars, exchanged their property, including the

furniture and fixtures, with plaintiffs, for certain farm lands situated in Clay county, Iowa, which were also incumbered by mortgage for the sum of eight thousand dollars. Each of the parties assumed the payment of the mortgage upon the other's property, and defendants paid plaintiffs the sum of five hundred dollars in addition to the hotel property for the lands. Plaintiffs also assumed and agreed to pay all taxes levied and assessed against the hotel property for the year 1893, and defendants agreed to pay the taxes assessed against the farm property for that year. Defendants estimated their property to be worth fifteen thousand five hundred dollars, if clear of all incumbrances, and plaintiffs put in their lands at the estimated value of twenty-one thousand dollars. Plaintiffs claim that defendants falsely and fraudulently represented that there were no taxes levied or assessed against the hotel property other than those due the county and state, and withheld all knowledge of the special assessment, with intent to defraud them. Defendants deny fraud on their part in making the exchange, say plaintiffs assumed to pay all taxes and assessments, and that the assessment levied against the hotel property was invalid and unenforceable, and further pleaded the counterclaims hitherto mentioned. As we have

2 already stated, the trial court denied the claims of each of the parties, and, as plaintiffs do not appeal, we cannot give them any relief. The sole question in the case relates to defendants' right to recover on their counterclaim. The evidence shows without conflict that plaintiffs agreed to pay the unearned insurance premium, amounting to forty-six dollars and seventy-five cents, that but twenty dollars has been paid, and that defendants are entitled to judgment for the difference, to-wit, twenty-six dollars and seventy-five cents, with six per cent. interest from April 28, 1896. In the deed from plaintiffs to defendants the lands were described as certain fractional quarters of land in sections

7 and 18, in township 97 north, of range 35 west, and there is no other statement or covenant in the deed as to the number of acres conveyed. In order to recover, then, defendants must show that plaintiffs falsely and fraudulently represented the number of acres in the tracts described, or that they purchased the land by the acre, and that the amount paid by them was in excess of the sum they agreed to pay. *Hosleton v. Dickinson*, 51 Iowa, 244; *Belknap v. Sealey*, 14 N. Y. 151; *Ward v. Dean*, 69 Minn. 466 (72 N. W. Rep. 710); *Canal Co. v. Emmett*, 9 Paige, 168; *Powell v. Clark*, 5 Mass. 355; *Allen's Ex'x v. Shriver's Adm'r*, 81 Va. 174; *Pickman v. Trinity Church*, 123 Mass. 1; *Noble v. Googins*, 99 Mass. 235; *Stebbins v. Eddy*, 4 Mason, 414 Fed. Cas. No. 13,342. Defendants do not claim there was any mistake, and they do not ask an abatement of the price on account of mutual error as to the subject-matter of the contract; hence we have no occasion to consider what their rights might have been had such an issue been tendered. We may remark, however, that there is no evidence of mutual mistake. The evidence shows that for many years there had been a dispute as to the actual number of acres in these various congressional subdivisions of land. If we take the boundaries as fixed by the highways passing through the lands, then there are but six hundred and twelve acres of land conveyed by the deed. But, if we look to the government plat and field notes, then there are approximately seven hundred and seventy-eight acres of land in the tract conveyed. Just where the original monuments were placed is a matter of dispute, and we do not regard a determination of this question essential to a proper solution of the issues presented by this appeal. It is sufficient to say that we find no actual fraud was committed by plaintiffs in the negotiations leading to the exchange of properties. Both pieces of property were put in at fictitious values, and each party assumed the hazard incident to the exchange, not covered by the covenants of warranty contained in the deeds. Plaintiffs believed that the

lands conveyed by them, if resurveyed according to the original field notes, contained, approximately, seven hundred and seventy-eight acres, and they made no representations as to the number of acres contained in the tracts as bounded by the highways, or as defined by the other improvements. Defendants were content to receive whatever the descriptions in their deeds entitled them to, and knew the lands were originally surveyed as fractional quarters. While they estimated the total value of the land by multiplying the number of acres by twenty-seven dollars, plaintiffs sold the land in gross, received a gross consideration in exchange, and refused to covenant as to the number of acres,—as they struck that part out of the deed. No such false and fraudulent representations were made by plaintiffs as entitles the defendants to recover, and, as the sale was in gross, and not by the acre, there can be no recovery for any deficiency in the quantity of land conveyed. *Winston v. Browning*, 61 Ala. 80. The trial court should have allowed defendants the amount of the unpaid premium for unearned insurance, and the cause will be remanded for a decree in harmony with this opinion. As practically all the costs of the appeal were made on the issue on which the appellants are unsuccessful, they will pay all the costs in this court, except the sum of five dollars, which last-named sum will be paid by appellee.—MODIFIED and AFFIRMED.

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STATE OF IOWA, Appellant, v. CHRIS JOHNSON and JENS  
HANSEN.

**Criminal Law: MINORS:** *Billiard hall.* One permitting minors to be in a room where he sells cigars, candy, and peanuts, and keeps two billiard tables, on which people generally are permitted to play pool at a fixed fee per game, violates Code, section 5002, prohibiting the keeper of a billiard hall from permitting minors to remain therein.

*Appeal from Palo Alto District Court.*—HON. W. B. QUARTON, Judge.

TUESDAY, MAY 9, 1899.

THE defendants are accused of maintaining a public billiard hall, in which minors were permitted to remain and take part in playing billiards. The court directed a verdict of acquittal on which judgment was entered. The state appeals.—*Reversed.*

*Milton Remley*, Attorney General, and *John Menzies*, County Attorney, for the State.

*Thomas O'Connor* for appellees.

LADD, J.—It may be conceded that the game of billiards is essentially different from that of pool, and that, in allowing minors to engage in the latter game, the law was not violated. See *Squire v. State*, 66 Ind. 317; *Sikes v. State*, 67 Ala. 77. But, when engaged in the game they remained in the defendants' room, containing two tables on which either game might be played. It is quite immaterial whether the minor indulges in any game whatever. If he is permitted to enter the room and remain therein for any purpose, and that room is a billiard hall, the keeper is amenable to the penalties of the law. This is evident from the reading of the statute: "No person who keeps a billiard hall, beer saloon, or nine or ten pin alley, nor the agent, clerk, or servant of any such person, nor any person having charge or control of any such hall, saloon or alley, shall permit any minor to remain in such hall, saloon or alley, or take part in any of the games known as billiards, nine or ten pins." Code, section 5002. If the games be different, both are played on tables which are invariably described by the lexicographers as billiard tables of four or six pockets or without pockets, and these fix the character of the room in which they are kept. Thus the Century Dic-

tionary defines "pool" as "a game played on a billiard table with six pockets." The Standard Dictionary, "One of the various games played on a six pocket billiard table." It is treated in Webster's International Dictionary and the Encyclopedia Britannica as a kind of billiards. We readily defer to the supreme court of Indiana in distinguishing between the games to be played on the table; but the definition of the lexicographers and encyclopedias, to the effect that, whatever the game, the pocketed and pocketless are alike billiard tables, cannot be ignored. The term "pool room" also has a well-understood meaning as a gambling resort. If properly applied to such a place as defendants', this will not defeat the purpose of the statute. It is not so important what the place was called as what it really was. Two billiard tables on which people generally were permitted to play pool at a fixed fee per game were kept in a room by defendants, and, notwithstanding the incidental sale of cigars, candy and peanuts, they constituted it a billiard hall within the meaning of the law. We are more inclined to this view because of the enactment of the statute, of which that in the Code is a copy, in 1874, when all tables in common use had pockets. All such resorts were then known as billiard halls, regardless of the games played, and we think that is still the ordinary designation, notwithstanding subsequent improvement in the construction of tables.—REVERSED.

108 247  
131 226

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MARGARET ACKERMAN, in her own right and as next friend  
of GEORGE S. ACKERMAN, minor, Appellant, v. FRED  
HILPERT *et al*.

**Limitation of Actions: GUARDIAN'S BOND:** *Tolling statute.* Code, 1873, section 2251, provides that "a failure to comply with an order of the court \* \* \* shall be deemed a breach of the conditions of the guardian's bond." Section 2271 provides that, before any sale of land of a ward can be made, "the guardian must give security to the satisfaction of the court, \* \* \* conditioned that he will faith-

fully perform his duty in that respect and account for and apply all moneys received by him under the direction of the court." *Held*, that when the ward becomes of age, the statute of limitations commences to run against a cause of action on the bond for failure to account, whether or not demand for an accounting be made, and whether or not the guardian be ordered to account by the court; and that the statute of limitations is not tolled by the death of a person after the statute has commenced to run against a cause of action in his favor.

*Appeal from Lee District Court.*—HON. HENRY BANK, JR.,  
Judge.

TUESDAY, MAY 9, 1899.

ACTION to recover upon a guardian bond. A demurrer to the petition was sustained. Plaintiff electing to stand upon the petition, judgment was rendered in defendants' favor for costs. Plaintiff appeals.—*Affirmed*.

*A. J. McCreary* for appellant.

*W. B. Collins* and *J. C. Davis* for appellees.

WATERMAN, J.—The record presents but a single question,—was the cause of action set out by plaintiff barred by the statute of limitations? The facts stated in the petition are as follows: Jacob Ackerman died in the year 1860, leaving surviving a son, George Ackerman, then some six years of age, and a widow, Margaret Ackerman. The widow was duly appointed guardian of the child. Subsequently she married the defendant, Fred Hilpert. On August 15, 1870, said guardian procured an order of the proper court, authorizing her to sell certain real estate of her ward. As required by law, she executed an additional bond, and the defendants herein were surety thereon. The real estate was duly sold. In 1875 the ward attained his majority, and in 1883 he died. The plaintiff, Margaret Ackerman, is his widow, and George L. Ackerman his son. It is claimed that Margaret Hilpert never accounted to her ward for the proceeds of the sale of

real estate mentioned. The present action was begun November 3, 1897. Upon attaining his majority, in 1875, the ward was entitled to demand an accounting and settlement by his guardian. The relation of debtor and creditor existed between them, and then the statute began to run. *Wycoff v. Michael*, 95 Iowa, 559; *Humphreys v. Mattoon*, 43 Iowa, 556; *State v. Willi*, 46 Mo. 236; *Paine v. Jones*, 93 Wis. 70 (67 N. W. Rep. 31). The ward, having a right to an accounting upon reaching his majority, could not, by postponing a demand therefor, extend the period of limitation. *Lower v. Müller*, 66 Iowa, 408; *Bank v. Greene*, 64 Iowa, 445; *Mickel v. Walraven*, 92 Iowa, 423. An action upon the bond would be barred in ten years from the time the right accrued. Code, section 3447, subdivision 7. The cause of action was therefore barred in 1885. The death of George Ackerman, before the period of limitation had fully expired, could not have the effect to toll the statute. *Bishop v. Knowles*, 53 Iowa, 271; *Grether v. Clark*, 75 Iowa, 385. Appellant's theory is that the statute does not begin to run until the guardian is ordered to account by the probate court, and, as this has not been done, the cause of action is not barred. The case of *O'Brien v. Strang*, 42 Iowa, 643, is cited as so holding. We may first observe that the statute of limitation was not in issue in that case. The only question there decided was that a guardian could not be sued on his bond until his accounts had been settled in the probate court and the amount of his liability fixed. But we do not think the ward, by delaying action to secure this accounting, can postpone the running of the statute. No settlement of the guardian's accounts has ever been had in the probate court in this case, but the point is not raised that plaintiff on this account has no right to maintain this action.

Some language is used in *O'Brien v. Strang* which lends an apparent support to appellant's contention. It was not, however, necessary to a decision of the issues before the court. But it may be well for us to say something as to the meaning



of the statutory provisions involved, in view of the claims made for that case. Guardians must give bonds conditioned "for the faithful discharge of their duties as such guardians according to law." Code 1873, section 2246. Section 2251 provides that "a failure to comply with any order of court \* \* \* shall be deemed a breach of the conditions of the guardian's bond." Now, it is a guardian's duty to settle with his ward on the latter's coming of age, and we understand section 2251 to add something to this duty; that is, to require obedience to all orders of court. It is not intended by this section to say that a guardian is not guilty of a breach of duty unless he violates an order of court. While section 2261, which requires an additional bond on sale of real estate, provides for conditions of the bond different in terms from those of the original bond, as the provisions of the latter are set forth in section 2246, we do not think these instruments can be held to differ in legal effect. They are both intended to insure the discharge of duty by the guardian. A failure to account to the ward when he reaches majority is a breach of duty under both obligations, and, upon this breach, a right of action accrues to the ward, and the statute of limitation begins to run against it. *Humphreys v Mattoon*, *supra*, cannot be reconciled with the construction given by plaintiff to *O'Brien v. Strang*, unless we are prepared to say that an action may be maintained as against the sureties, though barred as against the guardian. We do not care to indorse such a proposition. The action is clearly barred, and the judgment of the district court must be AFFIRMED.

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R. B. CLARK, Appellant, v. JAMES C. VAN LOON.

**Limitation of Actions: FRAUDULENT CONVEYANCE:** *Recording deed.*  
An action to recover the value of land held by a defendant as security and fraudulently conveyed by him by a deed which appears of record is barred by the lapse of five years from the date of record although plaintiff is a nonresident of the state and had no actual notice of the fraud, Code 1873, section 2529, subdivision 4,

declaring that an action for relief on the ground of fraud must be brought within five years after the cause of action accrues.

**Appeal: APPEALABLE ORDERS: Verdict.** An appeal does not lie from  
1 the verdict of the jury.

**DIRECTED VERDICT.** Where a notice states that an appeal was taken from the finding and judgment of the trial court, but the record  
2 fails to show that any judgment was rendered, the appeal will be considered as taken from an order directing a verdict.

**SAME.** Under a statute allowing an appeal from an intermediate  
2 order involving the merits or materially affecting the final decision, an order directing a verdict is appealable.

*Appeal from Louisa District Court.*—HON. A. R. DEWEY,  
Judge.

TUESDAY, MAY 9, 1899.

ACTION at law to recover the value of an interest alleged to have been owned by the plaintiff in land conveyed by the defendant to a third person. When the evidence had been submitted, a motion for a verdict for the defendant was sustained, and a verdict for her was returned by direction of the court. The plaintiff appeals.—*Affirmed.*

*J. M. Greenman* and *L. A. Riley* for appellant.

*D. N. Sprague* and *Hale & Hale* for appellee.

ROBINSON, C. J.—The petition alleges that on the twentieth day of August, 1880, the plaintiff was the owner of a tract of eighty acres of land, which is described, but that the record title thereto was held by his brother, J. B. Clark; that on the date specified, the defendant held two notes which the plaintiff had indorsed, and the payment of which he had guaranteed; that, for the purpose of securing the payment of the note, the plaintiff and the defendant agreed with each other that the plaintiff should cause J. B. Clark and his wife to convey the land to the defendant, to be held by her as security for the payment of the notes and taxes on the land, which it was agreed she should pay, and that the defendant

should convey the land to the plaintiff, whenever he should desire to sell it, upon payment by him of the amount for which it should be held as security, and that she would not convey it to anyone else; that the land was conveyed to the defendant pursuant to that agreement; that on the thirtieth day of June, 1887, she fraudulently, and with intent to cheat and defraud the plaintiff, conveyed the land for the consideration of one thousand dollars to one A. W. Van Loon, and fraudulently concealed from the plaintiff her conduct and actions in the matter; that afterwards, and before the thirty-first day of March, 1892, her grantee conveyed the land to other parties; that, on the date last specified, the plaintiff notified the defendant that he desired to sell the land, and requested her to send him a deed therefor, with a statement of the amount due her on account of notes and taxes; that she thereupon executed a quitclaim deed for the land to the plaintiff, and forwarded it, with the notes and tax receipts to a bank in Austin, Minn., for the delivery of the deed on the payment of the amount due on the notes and for taxes paid; that at that time the plaintiff first ascertained that the taxes for the years 1888 to 1891, inclusive, had not been paid, and upon investigation, learned that the land had been conveyed as stated. He asks judgment for one thousand two hundred and ninety dollars, with interest and costs. The answer admits the conveyances, alleges that the defendant paid full consideration for the one to her, denies the alleged fraud, denies that she ever knowingly sent any deed to the plaintiff, and avers that she acted in good faith in all that she did. The answer also avers that the plaintiff's alleged cause of action is barred by the statute of limitations.

I. The notice of appeal is set out in the record, and states that the appeal is taken from "the findings and judgment" of the trial court, but the record fails to show that a judgment was rendered on the verdict. An appeal  
1 from the verdict of a jury is not allowed. *Jones v. Givens*, 77 Iowa, 173. See, also, *Boyce v. Railway*

Co., 63 Iowa, 70. But the statute provides that an appeal may be taken from an intermediate order involving the merits or materially affecting the final decision. The  
2        action of the trial court in sustaining the motion to direct a verdict and in directing a verdict constituted such orders; and, treating the appeal as from them, we proceed to consider the only questions presented which we find it necessary to determine.

II. The evidence tends strongly to sustain the averments of the petition. It is shown, however, that the deed of the defendant to Van Loon purported to be an absolute conveyance of the land, and that it was recorded on the second day of July, 1887. This action was commenced in August, 1895,—about fifteen years after the alleged agreement with the defendant and the conveyance to her were made,  
3        and a little more than eight years after her deed to Van Loon was recorded. The execution of the last named deed was, in effect, a disavowal of the alleged trust for which the title to the land was held, and could not have been otherwise understood, and the statute of limitations then commenced to run, if, as claimed by plaintiff, it was not then running. *Potter v. Douglass*, 83 Iowa, 190. An action for relief, on the ground of fraud, must be brought within five years after the cause of action accrued to avoid the bar of the statute. Code 1873, section 2529, subdivision 4 (Code, section 3447, subdivision 6). We said in *Nash v. Stevens*, 96 Iowa, 616, that the law does not contemplate actual knowledge of the fraud before the statute begins to run, but such knowledge or notice as would lead a man of reasonable prudence to make inquiries which would disclose the fraud; also that, as the recording of a deed imparts constructive notice of its contents, if the facts which a record of a deed shows, with other facts known, are of a character to suggest fraud, persons interested must be charged with the knowledge which inquiry made with reasonable diligence would disclose. What was thus said had special reference to creditors;

but we are of the opinion that it is applicable to persons interested in the land which is fraudulently conveyed by the deed which appears of record. See *Bishop v. Knowles*, 53 Iowa, 268; *Gebhard v. Sattler*, 40 Iowa, 152; *Sims v. Gray*, 93 Iowa, 38; *Mickel v. Walraven*, 92 Iowa, 423; *Hawley v. Page*, 77 Iowa, 240; *Francis v. Wallace*, 77 Iowa, 373; *Laird v. Kilbourne*, 70 Iowa, 83; *Mohlis v. Traffler*, 91 Iowa, 751. The plaintiff is a non-resident of the state, and did not have actual notice of the fraud of the defendant until April, 1892; but those facts did not prevent the running of the statute. *Bishop v. Knowles*, *supra*. The record of the deed was notice to the world of its contents; and, had the plaintiff read it, he would have known at once that the defendant had repudiated the alleged trust. It follows that this action was barred by the statute of limitation when it was commenced. The orders of the district court in question are therefore AFFIRMED.

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J. B. McLAUGHLIN v. E. Y. ROYCE, Appellant, and O. M. BARRETT.

**Deeds: RIGHT TO REPURCHASE.** A deed reserved to the grantor the right to repurchase at a certain price within two years. A witness who heard the negotiations testified that it was agreed that

- 1 if the grantor desired to take the land off the grantee's hands, at a certain price, within two years, the latter would redeed it to him. The grantor testified that he reserved the right to repurchase by paying the sum named in the deed, "which was only given for securing the same as a mortgage." The grantee testified that he was to deed the land back within two years "if he still owned it." *Held*, that the evidence did not sustain the grantor's contention that the deed was a mortgage. Besides, as the arrangement to reconvey created nothing but an option to repurchase, the grantor made no debt for a mortgage to secure.

**DEMAND.** Where a deed provided that the grantor might repurchase of the "grantee or his assigns" within a certain time, a demand

- 3 and tender by the grantor to the grantee, with knowledge of the sale of the land by the latter to a third person, are not sufficient; they should be made to the assignee.

**TENDER.** A grantor was entitled to a reconveyance on payment of \$1,500, but, before tender, the land was sold to third person, who  
4 assumed a mortgage of \$600. *Held*, that the latter was not obliged to accept a tender of \$1,000.

**Breach of Covenant: ASSUMING MORTGAGE.** Where the seller of land covenants against encumbrances, the covenant is breached and  
5 damage shown if a mortgage exists even though the buyer sells again and the last grantee assumes such mortgage.

*Appeal from O'Brien District Court.*—HON. SCOTT M. LADD,  
Judge.

TUESDAY, MAY 9, 1899.

ACTION in equity to quiet the title in the plaintiff to certain land described, as against the defendant E. Y. Royce. upon hearing on the issues joined, judgment and decree were rendered against the defendant E. Y. Royce, from which he appeals.—*Affirmed*.

*Boies & Roth* for appellant

*E. C. Herrick* for appellees.

GIVEN, J.—I. Appellant being the owner of the land in question, did, on the seventeenth day of July, 1888, in pursuance of an agreement for an exchange of properties, convey the same to defendant O. M. Barrett by deed containing the usual covenants that the land was free of all incumbrances, and for the recited consideration of one thousand five hundred dollars. This deed, after describing the land, contains the following: "Sold subject to the lease of 1888, which inures to grantor, except that the grantor or his heirs or assigns, has the right at any time within two years, by the payment of fifteen hundred dollars cash, or one-fourth cash and balance in five equal payments, at eight per cent., to repurchase this tract of land of the grantee, or his heirs or assigns." Defendant Barrett conveyed the lots in Sheldon given in exchange for this land, to the appellant, and he took possession thereof. On the twenty-fourth day of

November, 1888, Barrett conveyed the land to the plaintiff for the consideration of one thousand dollars, subject to a mortgage of six hundred dollars that plaintiff assumed, which mortgage had been put upon the land by appellant when he owned it. Plaintiff went into possession of the land, made lasting and valuable improvements thereon, paid taxes and interest on said mortgage debt. Appellant alleges and

1 contends that, at the time he executed said deed to Barrett, it was orally agreed, in addition to what is recited therein, that said deed "should be and operate as a mortgage upon said premises for the security of the payment of said sum of money." He further alleges that on the fifteenth, and again on the sixteenth, day of July, 1890, he tendered one thousand five hundred dollars in money to O. M. Barrett, and demanded a reconveyance of said land, which he refused to make. He prays that said deed be decreed to be a mortgage, that it be foreclosed, and that he have a reasonable time in which to redeem therefrom, or, if said deed is not decreed to be a mortgage, that a decree be entered that, upon payment of one thousand five hundred dollars into court, said land be reconveyed to him. Appellees deny that it was agreed that said deed should operate as a mortgage, deny that appellant tendered one thousand five hundred dollars, as alleged, and deny that he is entitled to a reconveyance upon the payment of one thousand five hundred dollars; and herein we have the first issues to be considered.

II. As to the alleged oral agreement, it appears that, after negotiating for several days, it was agreed that Barrett would convey to Royce certain lots in Sheldon, in consideration of which Royce would deliver to Barrett certain personal property, and a conveyance of the land in question free of incumbrances. The personal property was delivered, and the conveyance made, as already stated. S. A. Calvert, who heard the negotiations, says: "It was agreed that, at any time within the next two years, if Royce desired to take the land off Barrett's hands at one thousand five hundred dollars,

he (Barrett) would re-deed the land to him (Royce), and thereupon the trade was consummated." Royce testifies: "I decidedly reserved the right of repurchasing by paying Mr. Barrett one thousand five hundred dollars,—agreed to the conditions named in the deed, which was only given for securing the same as a mortgage." Barrett testifies: "Mr. Royce and I were trying to make a trade. He said he wouldn't take my Sheldon lots unless he could trade me land for them. I asked him two thousand dollars for the lots. He offered to take the lots at two thousand dollars, if I would take the land in question at one thousand six hundred dollars. I offered one thousand five hundred dollars for the land. I finally told him that I would not take the land at one thousand six hundred dollars, but I would take it at one thousand five hundred dollars, and that, if I still owned the land, that I would sell it back to him any time within two years; and he finally said that he would do that, and that he would accept the offer." These witnesses do not materially differ as to what the agreement was, except that Barrett says he was to sell it back "if I still owned the land;" but he does not plead such a condition, nor does the preponderance of the evidence sustain it. From the recital in the deed quoted above, and this evidence, it is clear that Mr. Royce had an option to repurchase the land within the time and on the terms specified in the deed. Such an agreement did not create any indebtedness from Royce to Barrett to be secured. No indebtedness could arise until Royce exercised his choice to repurchase. There is no evidence to sustain the claim that it was agreed that the deed was to operate as a mortgage, and the terms of agreement preclude such an understanding.

III. The agreement, as recited in the deed, was that Royce, or his heirs or assigns, had the right, at any time within two years, by the payment of one thousand five hundred dollars cash, or one-fourth cash and the balance in five equal payments at eight per cent., "to repurchase this tract of



land of the grantee or his heirs or assigns." There was no obligation on the part of Royce, his heirs or assigns, to take the land. It was a mere option, that could not be enforced. Mr. Royce alleges, as showing an election on his part to take the land, that, in compliance with the agreement, he within two years tendered one thousand five hundred dollars in cash to Barrett, and demanded a reconveyance of the land. Appellant knew at and long before the date of the alleged tender that Barrett had conveyed the land to plaintiff. That deed was filed for record November 24, 1888. The agreement was that Mr. Royce, his heirs or assigns, might purchase "of the grantee, his heirs or assigns." Barrett having conveyed the land to the plaintiff, the right to repurchase was from him, not from Barrett. There was nothing in the contract to prevent Barrett from conveying to another, subject to the option. The deed expressly provides for that, in giving appellant the option to repurchase from Mr. Barrett, "or his heirs or

assigns." Appellant does not allege that he ever made  
3 any tender of money to the plaintiff, and demanded of him a conveyance of the land. Though not alleged, evidence seems to have been fully taken on that subject, and also as to the alleged tender to Barrett, Mr. Royce says: "I went with my son, F. B. Royce, to Barrett, with one thousand five hundred dollars; and he tendered the money to Mr. Barrett, and made a written demand, and retained a copy of the written demand, demanding a deed of Mr. Barrett. Mr. Barrett said he was powerless, as far as making a deed was concerned, and said, 'See Mr. McLaughlin about that.' I asked Mr. Barrett how much I should pay Mr. McLaughlin; and he said if Mr. McLaughlin had not paid the mortgage, he would be entitled to one thousand dollars." Mr. F. B. Royce identifies a written notice, dated July 15, 1890, from appellant to Barrett, demanding a reconveyance of the land on compliance therewith, and offering therewith to pay one thousand five hundred dollars in cash, or on the terms named in the deed, if preferred. He says that on the day of its date

he read said notice to Mr. Barrett, and that: "In making the tender, I informed him that I had one thousand five hundred dollars, to pay him, with me, and said Barrett refused to execute a deed of the same; and on the 16th day of July, 1890, I took a warranty deed to him, and requested him to execute the same, and told him I had the money; and he still refused to execute a deed, and said that McLaughlin was the one to make deeds." While Mr. Royce had the money, and displayed it, it was not counted, because Barrett refused to receive it and make a deed, but properly referred Mr. Royce and his son to the plaintiff. If it might be said that this was sufficient tender in form, it was not made to the proper person. The land having been conveyed to plaintiff, and appellant knowing that fact, the tender should, under the terms of the deed, have been made to the plaintiff. The two years dated from July 17, 1888, and there is no evidence of any offer to the plaintiff until the eighteenth day of July, 1890. F. B. Royce testifies that on that day he tendered plaintiff one thousand dollars, and that his father demanded a quit-claim deed, and that plaintiff said he wanted the land, and had a bond to secure him on his deed from Barrett. Plaintiff testifies: "Royce came to me and said that he had a thousand dollars to pay me for the place. I told him I wouldn't take it. This was all on the eighteenth day of July, 1890. A few days after, he met me, and we talked again about the thousand dollar offer; and I offered then to take the thousand dollars, and he then said he would have to see Barrett. This was in the presence of Frank Frisbee. After he said he would see Barrett, he turned from us and went away, and never afterwards mentioned the matter to me." There is no evidence that a tender of any other sum than one thousand dollars was ever made to the plaintiff, and it is evident that appellant was not willing to pay that sum without seeing Barrett. In view of plaintiff's liability assumed in his deed, to pay the mortgage on the land, he was certainly not obliged to accept a tender of one thousand

dollars, even if it had been made in time. The cross bill of appellant was properly dismissed.

IV. The defendant Barrett, by cross bill, asks to recover damages against appellant, Royce, for a breach of the covenants in his deed against incumbrances, because of his failure to pay said six hundred dollar mortgage. Judgment was rendered in favor of Barrett against Royce for eight hundred and twenty-six dollars, with six per cent. interest from date of judgment. The covenant in the deed from Royce to Barrett is that the land was "free and clear of all liens and incumbrances whatsoever," while the fact is that it was incumbered by said six hundred dollar mortgage which Royce had placed upon it, and which he has failed to pay. Plaintiff assumed said mortgage as part of the consideration to Barrett for his deed. The covenant, the breach, and the damage appear beyond dispute. The judgment and decree of the district court are correct, and they are **AFFIRMED**.

LADD, J., took no part.

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ROBERT B. CONE, Appellant, v. JOHN WOOD.

**Tax Sale: PURCHASE BY CO-OWNER OF MORTGAGE.** Where land is assessed for taxes as one parcel, which is owned by two in severalty, a mortgagee of one owner cannot purchase the entire parcel at a tax sale, and acquire title, so as to divest the other owner.

**Tax Title.** The purpose of a mortgagee in taking and assigning tax sale certificates does not go to the validity of the tax sale.

**RULE APPLIED.** Where a party seeks to perfect his title under tax deeds, he must have the support of a valid tax title; hence the purpose of a party through whom he claims in taking an assignment of the certificates is immaterial, since it does not go to the validity of the tax sale.

**Tender in Equity: PLEADING.** An allegation in an answer in an action to quiet title that defendant has at all times been ready and willing to redeem and to pay the lawful amount of taxes, tax

- 8 sales, penalties and interest chargeable on the property and hereby offers and tenders the same and offers to pay it to plaintiff or into court at any time and keep the tender and offer good whenever ascertained or on demand, is an absolute and unconditional offer to pay the amount due.

*Appeal from Woodbury District Court.*—GEORGE W. WAKEFIELD, Judge.

TUESDAY, MAY 9, 1899.

ACTION to quiet title. The facts, as presented by the record and in argument, are complicated. The primary inquiry is as to the validity of tax deeds. Prior to July, 1889, D. T. Hedges was the owner of lots 17, 18, and 19, in block 64, Pierce's addition to Sioux City, Iowa. The lots, as platted, lay in the southwest corner of the block, the west end of the lots abutting on Jones street, and lot 17, being the south one, lay along Thirty-second street. The east end of the lots abutted on an alley running through the block. The lots were each fifty feet in width by one hundred and fifty feet in length, so that the three lots made a tract one hundred and fifty feet square. Hedges, in the sale of the tract, changed the frontage to Thirty-second street, so as to make the lots fifty feet east and west, by one hundred and fifty feet north and south, but no change was made in the plat or record. For the year 1899 the lots were assessed as platted, and numbered 17, 18, and 19. The lots as sold, and fronting on Thirty-second street, may be known as east, west, and middle lot, and as the middle lot has little, if any, bearing on the question we are to consider, it may be left without further notice, except incidentally.

It may be well to first state the facts as to ownership of the east and west lots, regardless of the tax interest involved. On the eighth day of July, 1889, Hedges sold the east lot to A. M. Worden, who about the same time executed a mortgage thereon to the Missouri, Kansas & Texas Trust Company to secure three thousand five hundred and forty dollars. The

trust company foreclosed the mortgage afterwards, and the proceedings were such that the trust company received a sheriff's deed on execution sale for the east lot, July 7, 1891. The trust company sold the lot to the State Realty Company, January 2, 1893, and the trust company took back a mortgage for the purchase price, which interest it now holds. The middle lot was sold by Hedges, so that the title is not in him. Hedges also sold the west lot to one W. H. Cox for three thousand five hundred dollars, and took back a mortgage to secure two thousand dollars of the purchase price. This mortgage was sold to the defendant, Wood, and shows his interest in the lot.

We will now state the facts as to the tax title. As we have said, the lots were assessed by their platted numbers, 17, 18, and 19, and for the taxes of 1889, each lot being sold separately, and certificates were issued therefor,—that for lot 17 being to Keegan, that for 18 being to one Tollefson, and that for 19 to the trust company; and by assignments the trust company became the owner of all the certificates by January 7, 1891. The trust company paid the taxes on all the lots for the year 1890; that is, on the lots as platted. For the years 1891 and 1892 it paid the taxes on what we have called the middle and east lots, as they fronted on Thirty-second street, but not on the west lot, owned by Cox. At the tax sale of 1892, the trust company bid in the west lot, owned by Cox, for the taxes of 1891. In August, 1893, the trust company assigned the tax-sale certificates it held under the sale of 1890 for the taxes of 1889 to one George L. Farrell, who received from the county treasurer separate deeds for the three lots, as assessed, 17, 18, and 19. Farrell was an officer in the trust company, and took the assignments of the certificates under an agreement that he would take the tax deeds, and then deed to the trust company, or to whom it might direct, the east third of the lots, being what we are calling the east lot, and retain for himself the middle and west lots; and, in pursuance thereof, he did deed, by direction of the

trust company, the east lot to the realty company, it being an allied corporation to the trust company. The plaintiff was, from March, 1892, to May, 1896, the secretary of the trust company, and he brings this suit alleging ownership of the west one hundred feet of said lots, being the middle and west lot, under the other designation. Plaintiff came to his ownership of the lots by a conveyance, first, from Farrell of an undivided one-half of the lots; then Farrell and plaintiff joined in a deed to one Cooper of said lots; and, later, Cooper conveyed the lots to plaintiff. Plaintiff brings this action to quiet his title, making numerous parties defendant, but defendant Wood alone answers, denying the validity of the tax deeds, and offering to redeem. The district court held the deeds under which plaintiff claims void, and gave the defendant relief. The plaintiff appealed.—*Affirmed*.

*Taylor & Burgess* for appellant.

*Marks & Mould* for appellee.

GRANGER, J.—I. There is no doubt to our minds that plaintiff stands as to his rights under the tax deeds issued to Farrell, as would the trust company were it the plaintiff asking the same relief. By this we mean that there are no intervening equities in his behalf.

The question we now consider is, had the trust company the right to purchase at tax sale and take title to the west one-third of lots 17, 18, and 19, being what we have called the west lot? If it had not, it is because of its interest  
1 in the east one-third of these lots because of its mortgage thereon. Throughout the case it appears that the trust company, in what it did by way of obtaining the certificates of sale and assigning, acted alone with a view to protect its interest as mortgagee. Each lot being assessed as an entirety, with no prescribed legal method of making an apportionment of the taxes levied, so as to permit it to pay its proportion, on the basis of its interest, the company adopted

the expedient of protecting its interest by securing the title through the sale for taxes; that is, it adopted the plan of securing the certificates, and then disposing of them, so as to take title to itself of the east lot, or another for it, and permit another to take the title to the balance. The sales of the lots being separate, they may be regarded as separate transactions in our considerations.

That the trust company had the right to pay the taxes on the property on which it held the mortgage, see *Eck v. Swennumson*, 73 Iowa, 423. The same case also announces the rule that a mortgagee cannot, by purchase at a tax sale, defeat a senior mortgage or acquire title against the mortgagor. The holdings are as to the specific land covered by the mortgage. The rule is that attempted purchases of that kind amount to a payment of the taxes, and not to a purchase. We notice these unquestioned rules, to have in mind how the relationship of mortgagee affected the trust company in what it did. Then, as to the part of the lots covered by its mortgage, it had the right to pay the taxes, and not to purchase it. But it could not do that. And here we may say that it made the attempt with the treasurer of the county and the other parties, and no apportionment could be made, because of the entire assessment of each lot. The assessment was prior to the taking of the mortgage, and the mortgage was taken with knowledge of it. We think the mortgage gave to the trust company, for the purpose of protecting its interest against tax sales, the same rights as if it had purchased the same land. We have,

2        then, this question: Where the land is taxed as one parcel, which is owned by two in severalty, can a mortgagee of one owner purchase the entire parcel at tax sale, and acquire title, so as to divest the title of the other owner. This precise question does not seem to have been settled in this state. The case nearest in point is that of *Lewis v. Ward*, 99 Ill. 525. Lewis was the owner of the north half of lot 316, and taxes became due thereon. Before the tax sale Woodward became the owner of the north fifty feet, leaving

to Lewis the south twenty-five feet. Woodward, instead of paying the taxes, purchased at the tax sale the whole north half of the lot, and assigned the certificate, and a deed issued thereon to one Pitts, and Ward purchased the twenty-five feet owned by Lewis from Pitts. We quote from the case as follows: "The law is well settled that certain persons, on account of their relations to the property or their obligation to pay the taxes thereon, are forbidden by the policy of the law to become purchasers of the land at a tax sale. The rule admits of no exception, that a purchase by one whose duty it is to pay the taxes operates as payment, and nothing more. Where it is made to appear it was the duty of the party to pay the taxes on the lands, the disqualification at once attaches, and a purchaser will not be permitted to derive any advantage from that which it was his plain duty, under the law, to do. The rule on this subject is plain, and is so just that it commends itself to the common judgment as right. The only difficulty lies in the application of the rule to particular cases. It has been extended to a case where the land of the party making the purchase was taxed as one parcel with that of another and the whole sold together. That is precisely the case here. The whole of the north half of lot 316 was assessed to plaintiff. Of the north half of the lot plaintiff at the time owned twenty-five feet, and Woodward owned the other fifty feet. The entire tract was sold as it was assessed, as one parcel, and was purchased by Woodward, who owned, as has been seen, two-thirds of the property sold to himself. These facts bring the case clearly within the inhibition of the principle stated. A case exactly in point is *Cooley v. Waterman*, 16 Mich. 366. In this case, as in that, the sale was entire and undivisible, and resulted from the neglect of the purchaser to pay taxes on his own land. Had the purchaser first paid his own proportion of the taxes assessed on his land, his relation to the residue of the property and the taxes would then have been that of a stranger, owing no duty to the land or the tax, and the disqualification resting upon him would have



been removed. That he did not do, but chose, for some reason, to purchase the whole tract of land for the entire amount of taxes due upon it, the largest portion of which it was his duty to pay." The case concludes with a holding that the purchase at the tax sale operated as a payment of the taxes and gave no title. Had the trust company owned the land its mortgage was on, we do not see why the two cases would not be alike in principle. The inhibitions of the rule apply as strongly to a mortgagee as to an owner. In the cases the inhibitions are made to depend at times on when the person has the "right" to pay the taxes, and at others when he is under an "obligation" to pay them. The distinction is not as important as it is thought to be. The words are many times interchangeable in their use. Sometimes the word "obligation" is used to denote an agreement or undertaking to pay taxes; at others, it is used in the sense of an obligation to do so to protect an interest or title, as, in one sense, the owner of land is not under obligation to pay the taxes thereon, for he may forfeit it, and yet in another sense he is under such an obligation in order to preserve his title. The same is to be said of a mortgagee whose interest requires such a payment for its protection. He must forfeit his lien or pay the taxes. The Illinois case speaks of the owner paying his proportion of taxes assessed, as if that might have been done, and we do not lose sight of the fact that, in this case, there was no defined way of doing that. But, without an attempt to point out a way for doing it, which we should not do, it is to be said that, whatever was the legal requirement to discharge the taxes from the mortgaged lot, he was compelled to do, and thus relieve the land that he could not purchase at tax sale, but might pay the taxes on. If the company must pay all taxes due on a lot and take an added lien therefor, or, if a proceeding might be adopted to fix its proportion, in either case we think, before it could purchase at tax sale, it must make such payment that, if it takes a title, it will not be based in part on its own default. The thought runs throughout the cases.

As more or less sustaining the rule, see *Maul v. Rider*, 51 Pa. St. 377; *Cooley v. Waterman*, 16 Mich. 366; *Manning v. Bonard*, 87 Iowa, 648; *Fair v. Brown*, 40 Iowa, 209. It is true that few of the cases involve substantially the same facts. The general rule, in all its bearing, is against the right to acquire such a title. It could not be permitted, without involving complications that should be avoided.

Appellant cites a number of cases in support of his contention, and among them that of *Oswald v. Wolf*, 129 Ill. 200 (21 N. E. Rep. 839), being strongest in his favor, and yet it will be seen that its facts are so different as to make it distinguishable from this case. It will be understood that it was thought to be distinguishable from *Lewis v. Ward*, *supra*, by that court, for it followed that case without a reference to it. *Powell v. Lantzy*, 173 Pa. St. 543 (34 Atl. Rep. 450), is cited by appellant. We have cited *Maul v. Rider* from the same state as sustaining, to some extent at least, our conclusions. These cases, cited by appellant, state a rule peculiarly applicable to owners of land purchased after an incumbrance has attached, and for the discharge of which he is under no obligation arising from his acquisition of the property, and as to such he may perfect or better his title by a purchase at a tax sale. We do not see that such a rule has ever been held as to a mortgagee, and, in fact, the reasons do not exist for it. They are usually, if not always, against it. It is said, as against the defendant's claim, that he does not show that he, or Cox, his mortgagor, had title to the property at the date of the tax sale, but we think the facts appear throughout the record as we have stated them.

II. It is also said that defendant did not show that he or the person under whom he claims had paid the taxes due upon the property. It is conceded that an offer in the pleadings to pay the amount due is all that is required. The answer contains an offer to pay, but it is said to be  
3        conditional, and that such an offer is not sufficient. The pleading in this respect is as follows: "That this

defendant has at all times been ready and willing to pay the just and lawful amount of said taxes, tax sales, penalties, and interest that were chargeable on said west one-third of said lots, and hereby offers and tenders the same, and offers to pay the same to the plaintiff, or into court, at any time, and to keep said tender and offer good whenever the same shall be ascertained or on demand." We do not regard it as conditional, but absolute and unconditional. It accords with the rule as stated in *Crawford v. Liddle*, 101 Iowa, 148.

III. It is urged that the trust company had no further connection with the tax-sale certificates than that they should not be used against the east one-third of the lot; that it cannot be regarded as an actual assignee of the certificates. That the purpose of the company in taking and assigning the certificates was to protect its interest as mortgagee we have no doubt. But that fact does not affect the legal situation between plaintiff and defendant Wood.

Plaintiff seeks to perfect his title against Wood, and to do that he must have the support of a valid tax title. The purpose of the company does not go to the validity of the tax sale. The terms of redemption, if defendant is entitled to redeem, as prescribed by the court, are not questioned. The judgment will stand **AFFIRMED**.

108	268
127	284

108	268
132	435
132	438

108	268
143	43
143	111

**WAUGHTAL & SONS *et al.*, Appellants, v. DANIEL KANE *et al.***

**Deeds: RATIFICATION: *Husband and wife.*** To prove that a wife ratified a mortgage by her husband, it was shown that she afterwards joined in a quitclaim deed to the land, never disclaimed her husband's act, and made no defense to the foreclosure. *Held*, that this was insufficient, since joining in the deed did not indicate ratification, and, having parted with her interest in the land, there was no occasion for her to disclaim the act or to defend the foreclosure.

**Validity of Mortgage: ESTOPPEL TO DENY.** One party defending against a mortgage alleged that it was collateral, and demanded a marshalling of securities; another being substituted for him,

adopted his answer, and further admitted the mortgage appeared of record, and averred that it was without authority, and void. *Held*, that parties were not estopped by their answer to deny the validity of the mortgage.

**SAME: Assumption.** One purchasing without assuming encumbrances, but expecting to pay the valid liens, is not estopped to dispute their validity.

*Appeal from Palo Alto District Court.*—HON. W. B. QUARTON, Judge.

WEDNESDAY, MAY 10, 1899.

THE plaintiff firm and the individual members thereof bring this action for judgment on a promissory note dated April 4, 1895, for seven hundred and fifty dollars, executed by the defendants Daniel Kane and W. T. Kane to the plaintiff firm; also for a decree foreclosing a mortgage on real estate described, executed to secure the payment of said note. Judgment was rendered against the plaintiffs dismissing their petition and for costs, from which they appeal.—*Affirmed.*

*F. A. Kirschman and T. F. McCue* for appellants.

*Soper, Allen & Alexander* for appellees.

GIVEN, J.—I. The mortgage in suit describes the following real estate in Palo Alto county: "The south one-half of the south one-half of section fourteen, in township ninety-six north, of range number thirty-three west of the 5th P. M., Iowa, containing one hundred and sixty acres according to the government survey, subject to a mortgage of one thousand eight hundred dollars given to F. L. Dodge. This land is owned by Daniel and Mary Kane. Also the south one-half of the northwest quarter, and the north one-half of the southwest quarter, of section 14, in township ninety-six north, of range number thirty-three west of the 5th P. M., containing one hundred and sixty acres, accord-

ing to the government survey, subject to a mortgage of two thousand dollars to John C. Bennett. This land is owned by William T. Kane." Daniel Kane owned one of the forties first described, and he and his wife, Mary, resided thereon as their homestead. Mary Kane owned the other three forties by conveyance from her husband, Daniel, made about the twenty-sixth day of July, 1882. At that time Mary executed a power of attorney to Daniel Kane, authorizing "him in my place and stead to buy, sell, and convey all real estate and personal property, and collect all debts of every nature, whether legacies or interest, and give receipts in my name as full as I could do were I present myself." This instrument was duly acknowledged. The mortgage in suit as set out was executed by "Mary E. Kane, Daniel Kane, Mary Kane, by Daniel Kane, her attorney in fact." The abstract shows the name of "W. T. Kane" to the power of attorney, but not to the mortgage. As it is not claimed that he was a party to the power of attorney, and it is conceded that he was a party to the mortgage, we must assume that this is a mistake; but, whether so or not, it will not affect the question under consideration. The plaintiffs only seek foreclosure as to the land owned by Daniel and Mary Kane, the land of William T. Kane having been exhausted as a security by the mortgage thereon to John C. Bennett. On the fourteenth day of April, 1896, the defendant Celia G. Davies, with full knowledge of plaintiffs' mortgage and of the other lien on said land of Daniel and Mary Kane, purchased said land from them for the consideration of five hundred dollars, receiving their quitclaim deed therefor. After Mrs. Davies had appeared and answered in this case, to-wit, August 14, 1897, she and her husband, for the consideration of one thousand four hundred dollars, conveyed to W. S. Parnham "the same title that we received from Daniel Kane and Mary Kane," which conveyance Parnham received with knowledge of plaintiffs' mortgage and said other liens. Parnham was substituted as a defendant in the

place of Mrs. Davies, and answered, joining issues with plaintiffs. The First National Bank of Emmetsburg, a judgment creditor of Daniel and Mary Kane, also answered, joining issues with plaintiffs. Parnham and the bank alone appear in resistance to plaintiffs claims on this appeal.

II. Appellees' counsel contend and cite authorities to show that this power of attorney does not authorize Daniel Kane to execute mortgages as attorney in fact for Mary Kane. Counsel for appellants say: "Now this is entirely superfluous, as we agree with him on that point. We insist, however, that this unauthorized act of Daniel Kane was

ratified and accepted as her act by her conduct after  
1 she was apprised of such act." Counsel differ as to whether ratification of such an act must be in writing; but this we do not determine, as we think the evidence fails to show a ratification by Mary Kane in writing or otherwise. Such ratification must be clear and express, or be implied from circumstances equally clear and undisputed. *Haynes v. Seachrest*, 13 Iowa, 455. There is no evidence that Mary Kane ever expressly approved of the giving of said mortgage, nor convincing evidence that she knew of it prior to the commencement of this action. The acts relied upon as showing ratification are that Mary Kane joined in the deed to Mrs. Davies, that she has never disclaimed the act, and makes no defense to plaintiffs' mortgage. That she joined in the deed does not even indicate a knowledge of the mortgage, nor an approval thereof. If she did then know of the mortgage, the making of the quitclaim deed does not show ratification of it, but only a willingness, for the consideration received, to part with her interest in the land, whatever it might be. Having conveyed her interest before the commencement of this action, she had nothing left to defend for, and therefore her failure to appear cannot be construed into a ratification of the mortgage. Conditions may exist when not to disclaim an act may constitute a ratification thereof; but such conditions never existed

in this case. Mrs. Kane was never called upon to disclaim or affirm this mortgage until the commencement of this action, and, having parted with her interest in the land, there was no occasion for her doing so then. We agree with counsel that the power of attorney did not authorize Daniel Kane to execute this mortgage for and on behalf of Mary Kane, and we are of the opinion that the evidence fails to show that Mary Kane ever ratified the act.

III. Appellants insist that Mrs. Davies and Mr. Parnham are estopped by their answers and by the understanding as to plaintiffs' mortgage when Mrs. Davies bought the land. Mrs. Davies did answer, alleging, in effect,  
2       that the mortgage in question is collateral to one securing the same indebtedness on certain property in Estherville, and asking that plaintiffs be required to first exhaust that property. W. S. Parnham, when substituted as a defendant, adopted this answer; but he further answered, admitting that plaintiffs' mortgage appeared of record, averring "that the same was without authority, without consideration, and absolutely void, and these defendants, Celia G. Davies and W. S. Parnham, deny each and every allegation in the third paragraph of plaintiffs' petition contained." The validity of this mortgage was thus put in issue, and  
          therefore there was no estoppel by the answers.  
3       Neither Mrs. Davies nor Mr. Parnham assumed the incumbrances on the land, yet, knowing that the land was liable for valid liens, and that the Kanes were insolvent, they purchased, expecting to protect the title by paying the valid liens; but this does not estop them from questioning the validity of any of said liens. There was no understanding or agreement that Mrs. Davies or Mr. Parnham should recognize or pay the plaintiff's mortgage. It follows from the conclusions that plaintiffs take nothing by their mortgage as to the interest of Mary Kane in the lands against which foreclosure is sought. Daniel Kane had no interest in the three forties belonging to his wife that

he could mortgage, and he could not mortgage the homestead forty, unless his wife joined in the execution of the same joint instrument. Code, section 2974. This Mrs. Kane did not do, and therefore the mortgage is invalid, even as to Daniel Kane's interest in the homestead forty. In view of the conclusion, other questions discussed need not be considered.—AFFIRMED.

MARTHA J. ZUBER V. GEORGE W. JOHNSON *et al.*, Appellants,

108	273
141	258

**Sales: NOTICE TO BUYER.** Plaintiff conveyed land by deed, which was recorded; but she remained in possession, and several months afterwards recorded a deed back to her from her grantee, of the same date as the other, and providing that she would support him for life, as part of the consideration. Intermediate the recordation of the deeds, an attachment was levied on the land as her  
 1 grantee's. After the second deed was recorded, a sale was made, under the attachment creditor's judgment, to one who had been told that plaintiff claimed under an unrecorded deed and as a homestead. In fact, the deed back to plaintiff was antedated, not having been made until the day of record. *Held*, that the execution purchaser's rights were subject to plaintiff.

**Parol Evidence: TRUSTS.** Land conveyed to plaintiff on condition that she should support the grantor for life and afterwards exchanged for land of a third person, which by mistake, was conveyed to plaintiff absolutely. To rectify the mistake, she conveyed  
 2 it to the first grantor, on the agreement that he should reconvey to her on condition of support. Thereafter and before he reconveyed, the land was seized under an attachment against him. *Held*, that evidence of the parol agreement for the reconveyance on condition of support was not inadmissible as ingrafting an express trust on the deed to the first grantor.

*Appeal from Montgomery District Court.*—HON. N. W. MACY, Judge.

• WEDNESDAY, MAY 10, 1899.

IN 1892 J. E. Gepford owned a certain house and lot in Red Oak Junction, Iowa, and made a parol agreement  
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with the plaintiff, then a widow and the head of a family, to support him during his life, and to receive therefor the said house and lot; and, in pursuance of the agreement, plaintiff took possession of the property, and occupied it till 1895, when Gepford deeded plaintiff the property, for the same consideration, and subject to an incumbrance thereon of three hundred dollars. The deed contained the provision for the support, as a part consideration for the property, and a forfeiture clause in case of a failure of support. In May, 1895, this property was exchanged for another property, of greater value, the exchange being made even by plaintiff assuming an incumbrance on the new place of two thousand two hundred dollars. This property was conveyed to plaintiff and Gepford jointly, Gepford then conveying to plaintiff, with the same condition as to support. This property was also occupied by plaintiff. July 1, 1896, plaintiff exchanged this second property for a third one, evenly, the deed being made to her, as it is claimed, by mistake, it being the intention to take the conveyance jointly, as in case of the second property; and, September 9, 1896, to rectify said mistake, she conveyed the new property to Gepford, by warranty deed, under an agreement that he should reconvey to her, with the condition as to support in the deed, which was done March 1, 1897. This last property, when purchased, was under lease, and an assignment of the lease was taken by plaintiff. It is alleged that the first and second property were each occupied by her as a homestead, and that the third was obtained for that purpose, and intended for such occupation as soon as possession could be obtained. In November, 1896, defendant Heitt commenced suit against Gepford, aided by attachment, and levied on the last-acquired property; and it will be remembered that this was after plaintiff had conveyed the property to Gepford, and before Gepford had reconveyed it to her. Judgment was obtained in January, 1897, and the property thereafter sold, on special execution, March 6, 1897, to defendant Hughes. Prior to

June 11, 1896, defendant Johnson became a judgment creditor of plaintiff in justice court, and on that date he filed in the office of the clerk of the district court a transcript of his judgment, and he claims it to be a lien on the property. There are other defendants that need not be noticed. This action is brought to quiet the title in the premises in plaintiff, claiming that Gepford never had any interest in the property except his lien thereon for his support, and that defendant Hughes purchased the property with knowledge of plaintiff's rights, and that the property is exempt as her homestead, and because of pension money applied to its purchase to the amount of four hundred and thirty-four dollars. The district court found for the plaintiff, that the premises were her homestead, exempt from both the Heitt and Johnson judgments, and entered judgment quieting the title in her, as prayed. Defendants Hughes and Johnson appealed.—*Affirmed.*

*J. M. Junkin* and *Ralph Pringle* for appellant Johnson.

*C. E. & P. W. Richards* for appellant Hughes.

*W. F. Dutton* for appellee.

GRANGER, J.—As to appellant Johnson, the only question is whether plaintiff is the head of a family, so that the property is a homestead. We need only say that the fact clearly appears that she is the head of a family, so as to be entitled to the homestead right. As to appellant Hughes, his rights depend on his being protected because of his purchase at the sale on execution. He relies on the then condition of the record, which showed the title in plaintiff, the deed from Gepford having been filed for record March 1, 1897, and his purchase being on the sixth of that same month. But appellant's thought is that, the attachment having been levied November 5, 1896, when the title of record was in Gepford, the lien then attached, and that no

conveyance thereafter could affect such a lien. Some other facts are important. Before the purchase by Hughes, he was informed that plaintiff claimed to own the property by virtue of an unrecorded deed; and on the day of the sale the sheriff, who held the bid of Hughes, was notified that plaintiff claimed the property as her homestead, and held it by warranty deed. It also appears that the deed then on record, although really executed March 1, 1897, was dated back to September 9, 1896 (the date of the conveyance by plaintiff to Gepford), and in the deed is the provision as to support from that date, at least, as a part consideration for the property, which, with the possession in the plaintiff, was sufficient to put Hughes on inquiry to know the facts. The record, as to the information it gave, was somewhat peculiar. The conveyance from plaintiff to Gepford was September 9, 1896, and the deed back to her, although made and filed March 1, 1897, was dated September 9, 1896; so that, when Hughes made his purchase, the record disclosed facts to indicate that the conveyances to and from Gepford were practically simultaneous, which, with the provisions as to support in the deed, and the possession of plaintiff, makes an unusually strong case of notice to put a party on inquiry. The case is in no way within the rule stated in *May v. Sturdivant*, 75 Iowa, 116; *Bonnell v. Allerton*, 51 Iowa, 166, and like cases. In *Rogers v. Hussey*, 36 Iowa, 664, from which appellant quotes, is this language: "The record title would fully explain the fact of possession. It would be natural and reasonable for any one, under such circumstances, to refer the fact of possession to the legal title. No one would think of inquiring whether there was not also an equitable title, antedating the legal title. If it is not probable and natural that such inquiry would be made, the law does not require it to be made." This case, 1 in its facts, is somewhat the reverse of that. Here, the record condition is such that it plainly suggests the probable possession, at least, in plaintiff, at all times

since the conveyance to her originally. Some importance is attached to the fact that Hughes was notified that plaintiff claimed by virtue of a warranty deed, and that such notice was not of an oral agreement. But the deed itself gave notice of an agreement, so that Hughes was put on inquiry to know what it was. Appellant misapprehends the rule stated in *McCleery v. Wakefield*, 76 Iowa, 529. It states the rule that "a purchaser is bound to take notice of the right under which one in possession claims," but that "he is not chargeable with notice of a right or claim not asserted, or one which may subsequently accrue." The notice here is of matters asserted and relied on.

II. It is claimed that the evidence to show the agreement of Gepford for support was inadmissible, because it ingrafted an express trust on the deed to him of September 9, 1896. The evidence shows the reverse of an attempt to create an express trust. Gepford had an equitable interest to secure his support. The purpose was to secure him in that interest, and nothing more. The intention was to reconvey at once, which was not done, because of sickness and inadvertence, and by the transaction merely to effect a security. The judgment is **AFFIRMED**.

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PEOPLE'S SAVINGS BANK OF DES MOINES, IOWA, Appellant,  
v. E. W. GIFFORD *et al.*

**Bills and Notes: GAMBLING CONTRACTS: Consideration.** A person indebted to a bucket shop for margins on options gave a check drawn in favor of himself and endorsed in blank to one of the proprietors, who cashed it at a bank, and gave the money to his partner. Payment being refused by the drawee bank, it was returned to the bank where it had been cashed, and taken up with the note of the drawer, payable to the order of one of the bucket shop proprietors, and endorsed in blank. *Held*, that a finding that in cashing the check, the bucket shop proprietor did not act as the drawer's agent, that the alleged debt was not paid by the giving of the check, and that, therefore, the note was given in pay-

108 277  
117 518

108 277  
1133 287

ment of a gambling transaction, and hence was void, was warranted.

**SAME.** A note given in settlement of a balance growing out of 2 bucket shop transactions in which no delivery of the property dealt in was made or contemplated, is void.

**CHECKS: Payment.** The note was not purged of its illegal consideration by the fact that a third person signed it as surety, and that its payee was not the same as the payee of the check, and that, by giving it, an extension for the payment of the alleged debt was procured.

**SAME.** The acceptance of a check payable to the drawer or bearer, 3 and endorsed in blank, does not, in the absence of an express agreement, constitute a payment of the debt.

**Sureties.** One endorsing a note merely as a surety is not liable 4 thereon where it is void as against the maker.

*Appeal from Story District Court.*—HON. S. M. WEAVER,  
Judge.

WEDNESDAY, MAY 10, 1899.

ACTION at law to recover an amount alleged to be due on a promissory note. There was a trial by the court without a jury, and a judgment in favor of the defendant for costs. The plaintiff appeals.—*Affirmed.*

*Bailey & Ballreich and McCarthy & Lee* for appellant.

*G. A. Underwood* for appellees.

ROBINSON, C. J.—The note in suit was made by E. W. Gifford and H. M. Funson for the sum of four hundred and twenty-five dollars, was made payable to J. T. James or order, and is indorsed in blank. A payment thereon of two hundred and ninety dollars has been made. The defendants are the makers of the note. They allege that it was given in settlement of an alleged indebtedness which grew out of the gambling transactions had by Gifford with the firm of J. T.

James & Co., and that it is for that reason void. The 1 court was authorized to find that the material facts involved in the making of the note were substantially as follows: In the year 1896, the firm of J. T. James & Co.,

of which J. T. James and J. B. Henshaw were the members, was engaged in operating an office in the city of Des Moines known as a "bucket shop," and dealt in options on grain and stock. Actual delivery of the property in which the firm pretended to deal was not made or contemplated, and its business was prohibited by chapter 93 of the Acts of the Twentieth General Assembly. The defendant Gifford had dealings with the firm in its line of business, and in May, 1896, there was a settlement, at which it was agreed that Gifford owed the firm four hundred and fifteen dollars on account of his dealings with it in options. Thereupon Gifford drew his check, payable to himself or bearer, on a bank of Nevada, Iowa, for the amount stated, indorsed it in blank and delivered it to Henshaw. He took it to the plaintiff, and received from it the amount of the check, and paid it to James. The bank on which the check was drawn refused payment, the check was protested, and returned to Gifford, and the note in suit was then given in lieu of it and for protest fees.

I. It was well settled, prior to the enactment of chapter 93 of the Acts of the Twentieth General Assembly, that an executory contract for the sale of property is void where delivery of the property was neither made nor contemplated, and where settlement was to be made by the payment of the difference between the contract price and the market price of the property at the time fixed for settlement. *First National Bank of Lyons v. Oskaloosa Packing Co.*, 66 Iowa, 41, and cases therein cited. See, also, *Counselman v. Reichart*, 103 Iowa, 430. Transactions of that kind are mere gambling contracts. *Bank v. Carroll*, 80 Iowa, 11. See, also, *Shipley v. Reasoner*, 80 Iowa, 548; *Osgood v. Bander*, 75 Iowa, 550. They are also prohibited by chapter 93, already cited. If, therefore, the note in suit was given in settlement of a balance which grew out of dealings in options, it is void.

II. The appellant does not deny that the law is as stated, but contends that it is not applicable in this case. It is said

that Gifford delivered the check to Henshaw, with the request that he obtain the money for which it was drawn, and deliver it to James & Co.; that Gifford made the check payable to himself because he did not wish the bank on which it was drawn to know that he had been dealing in options; that he made Henshaw his agent to obtain money on the check; that Henshaw had nothing to do with transacting the business of the firm, although a member of it, and that in what he did he acted as the agent of Gifford; that the gambling debt was not paid with the check, but with the money obtained for it by Gifford, through his agent. We are of the opinion, however, that the evidence fully authorized the district court to find that Henshaw, in all he did, represented and acted for his firm, and not Gifford; that the giving of the check did not pay the gambling debt; and that the making of the note in suit was a part of the unlawful transaction.

The appellant contends that the rule which applies to ordinary checks should not be applied to the one in question, because that was made payable to the drawer. No authority is cited to sustain that claim, and we do not think it is well founded. The check was made payable to the bearer, and, although indorsed by the payee, would have passed current as readily without his indorsement. The plaintiff accepted the note in lieu of the check and the indorsement of Henshaw. It is true the payee of the note was not the payee of the check. The note was signed, not only by the drawer of the check, but also by another, and more than three months were given in which to pay the note, but none of these differences, singly or collectively, purged the note of its illegal consideration, nor give it validity. Funson was a surety merely, and is not bound by the note, if it is void as to his principal.

Some claim is made to the effect that the defendants are estopped to dispute the validity of the note, but the claim is not supported by the evidence. The finding of the district

court that the note was void has such support in the evidence that we are not authorized to disturb the judgment rendered. It is therefore **AFFIRMED**.

DEERE, WELLS & Co., Appellants, v. BONNE & WEST, D. K.  
BONNE, E. S. WEST, and J. C. BONNE.

**Husband and Wife: LIABILITY FOR DEBT: *Separate estate.*** A wife's separate property is not liable for her husband's debts, even though part of it has been accumulated on account of the skill and time gratuitously given by the husband to its management.

*Appeal from Shelby District Court.*—HON. WALTER I. SMITH, Judge.

WEDNESDAY, MAY 10, 1899.

**ACTION** in equity to subject property in the name of the wife to the payment of a judgment against her husband. Relief prayed was denied, and the plaintiff appeals.—*Affirmed.*

*Thos. H. Smith* for appellant.

*G. W. Cullison* for appellees.

LADD, J.—The stock in trade and building of J. C. Bonne were destroyed by fire August 20, 1892, and on the following day he assigned his other property not exempt from execution, together with claims under policies of insurance, to George H. Rink, for the benefit of all his creditors. Thereupon the good people of Shelby and vicinity raised, by voluntary contribution, about eight hundred dollars, and presented it to his wife, D. K. Bonne. With this she constructed another building, purchased goods, and engaged in business similar to that previously conducted by her husband. If the agent of the plaintiff arranged with him to

108	281
114	526
108	281
118	728
108	281
122	621
123	22
108	281
134	319



ship goods in the name of an employe or herself, to avoid creditors, she was not aware of it, and in fact paid the bills. In February, 1893, she formed a partnership with E. S. West, which has continued since, and the firm of Bonne & West has assets valued at over three thousand dollars. During all this time J. C. Bonne managed her interest in the business, and gave it his entire time and attention, without any agreement whatever with reference to his compensation. True, his answers on this point, in the proceedings auxiliary to execution, were somewhat equivocal. But these, when considered in connection with the answers of his wife, leave no doubt of the conclusion stated. Nor do we think the evidence justifies the conclusion that conducting the business in her name was a mere scheme to hinder and delay or defraud his creditors. The fact that he was doing business for and in his wife's name does not, alone, warrant such an inference. After the final distribution of the moneys by the assignee, derived from his estate, he was still indebted several thousand dollars, and it is evident that, without means, he was not in a situation to engage in business again. The money donated belonged to the wife, and we know of no reason why she might not re-establish the business of her husband, destroyed by fire, and prosecute it with her own means and credit. Code, section 3164. *Spafford v. Warren*, 47 Iowa, 47. That she did so, with the aid of her husband, and both so intended, this record leaves not the slightest doubt. The labor and sagacity of the husband undoubtedly contributed largely to the accumulation of the property, but these he voluntarily gave, with no agreement for recompense. In *Robb v. Brewer*, 60 Iowa, 540, the court said: "The use by the husband of his personal earnings in payment for property purchased by his wife amounts, in legal contemplation, to a gift of such property to his wife. As the earnings were exempt from execution at the time they were employed in the acquisition of the property in controversy, a voluntary gift of such earnings was no fraud upon the husband's cred-

itors. The earnings being exempt from execution, her husband had a right to employ them as he pleased." *Carse v. Reticker*, 95 Iowa, 25; *Nash v. Stevens*, 96 Iowa, 616. That neither the husband nor his creditors can lay any claim to the improvements of the wife's land or its products, though made or produced, in whole or in part, by his labor, is well settled. *Carn v. Royer*, 55 Iowa, 651; *Webster v. Hildreth*, 33 Vt. 457; *Burleigh v. Coffin*, 22 N. H. 118; *Feller v. Alden*, 23 Wis. 301; *Rush v. Vought*, 55 Pa. St. 437. In *Feller v. Alden*, *supra*, an apportionment is suggested, but held not to be involved, as the action was at law. In *Glidden v. Taylor*, 16 Ohio St. 509, the husband took the wife's property, and controlled it absolutely, merely telling her that he would "support the family, spend what money he desired, and invest the residue for her benefit;" and all save her investment, with interest, was subjected to the payment of his debts. In *Hoag v. Martin*, 80 Iowa, 718, the husband, in feeble health, and unable to do farm work, did all the business for the wife, and thereby aided in the accumulation of the property; and the court said: "In view of these facts, it was but natural, and in the ordinary course of experience, that he should attend to the business affairs of his wife; and the fact that his labor in this respect aided in the accumulation of the property, if voluntarily done, would not divest her of title, or give him a specific interest therein." In *Russell v. Long*, 52 Iowa, 250, the cows of the wife were cared for by the husband, and kept on a farm rented by him; and the court, speaking through Rothrock, J., said: "But it is contended that the increase of the property belongs to the husband, because he was the party by whose labor, skill, and care such increase was produced. If it had been shown that the husband hired the cows of the plaintiff for a given period, and that during such period the increase was produced, there might be force in the suggestion. But the record shows that the husband voluntarily expended his labor, and the products thereof, in

the care and keeping of his wife's property; and it does not appear that there was any agreement for compensation, either in the increase of the property or otherwise. We think the property was not liable for the payment of the husband's debts." Whatever the obligation of the husband to work for the benefit of his creditors, there is no rule in law or equity preventing him from voluntarily and gratuitously devoting his labor and skill to the business of his wife. *Webster v. Hildreth, supra*. There is no magic in the husband's touch by which he may acquire an interest in her separate property by his mere supervision of labor. If entitled to anything, it must be compensation owing to an express agreement, as there is no implied obligation on the part of the wife to pay her husband for services rendered. *Lewis v. Johns*, 24 Cal. 98. *Penn v. Whitehead*, 17 Grat. 503 (94 Am. Dec. 478), is not in point, as that was a contest between creditors, in which the rights of the wife were not involved. We conclude that, as the wife engaged in the business of the firm of which she is a member in good faith, and the husband voluntarily gave his services, he acquired no interest in the firm property which may be subjected to the payment of his individual debts.—AFFIRMED.

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JANE McCARTHY, Appellant, v. GEORGE TRUMACHER.

**Landlord and Tenant: REMOVAL OF IMPROVEMENTS.** The execution of a new lease, providing that the tenant should deliver the premises in as good condition as they were then in, does not deprive him of a right granted under a prior lease to remove improvements erected by him with the knowledge and consent of the lessor and which were removable without material injury to the realty; the occupancy being continuous under both leases.

*Appeal from Plymouth District Court.*—HON. JOHN F. OLIVER, Judge.

WEDNESDAY, MAY 10, 1899.

108 284  
116 397

108 284  
126 720

Action to recover rent and for damages caused by the removal of outbuildings and fences taken by defendant. The action was brought originally in a justice court. Upon hearing there had, there was a judgment for defendant. Plaintiff appealed, and the cause was tried in the district court, the result again being in defendant's favor. It comes to this court, through plaintiff's appeal, on certain questions certified by the district court, to which we shall more specifically refer hereafter.—*Affirmed.*

*J. J. Gibbon and I. S. Struble* for appellant.

*Zink & Roseberry* for appellee.

WATERMAN, J.—Defendant leased a tract of land from plaintiff, by oral agreement, for the year ending March 1, 1893, with the privilege of renewal. It was part of this agreement that defendant should have the right, when his tenancy ceased, to remove from the premises any and all improvements which he should make for his own convenience. During his occupancy, defendant, with the knowledge and assent of plaintiff, placed on the leased premises the property which is the subject of this action. Thereafter defendant took from plaintiff a written lease containing this provision: "That he [defendant] will deliver up said premises at the end of said term in as good order and condition as the same are now in, or may be put in by said lessor, reasonable use and wear thereof, accident by fire, and other casualties, happening without fault of the lessee, excepted." The occupancy of the tenant under the different leases was continuous. The removal of the improvements was made about the time the tenancy ceased, and without material injury to the real estate. This statement of the facts as recited in the certificate of the trial judge will suffice to an understanding of the questions submitted, which are as follows: "(1) Did the improvements in question, by virtue of the parol agreement aforesaid, become and remain

the personal property of the tenant after the execution of the written lease, notwithstanding the agreement contained therein, and hereinabove quoted? (2) Did the defendant, by signing the written lease without reserving therein the right to remove such improvements, become estopped from removing them after March 1, 1896, without the consent of the landlord? (3) Could the tenant, by virtue of the previous parol lease, and the aforesaid parol agreement as to improvements, without the consent of the landlord, legally remove and carry away said improvements, notwithstanding the terms of the written lease above stated, without being liable to the landlord for the reasonable value of the materials of which said improvements were made?"

The rule established at law is that if a tenant, during his term, has made improvements on the leased premises which would be deemed a part of the realty as between grantor and grantee, and at the end of his term surrenders possession to the landlord without removing such fixtures, the title thereof vests in the latter. The greater number of cases hold that the taking of a new lease which contains no agreement as to the fixtures operates as a surrender, and deprives the tenant of his right of removal. *Carlin v. Ritter*, 68 Md. 478 (13 Atl. Rep. 370); *Hedderick v. Smith*, 103 Ind. Sup. 203 (2 N. E. Rep. 315); *Sanitary Dist. v. Cook*, 169 Ill. Sup. 184 (48 N. E. Rep. 461); Taylor Landlord & Tenant, section 552. There are, however, some well considered cases opposed to this doctrine. See *Kerr v. Kingsbury*, 39 Mich. 150; *Second National Bank v. Merrill Co.*, 69 Wis. 501 (34 N. W. Rep. 516). But we are not required to decide this question. In the case at bar, by express agreement between the landlord and the tenant, these improvements were determined to be chattel property, with a right of removal in the tenant. *Corwin Dist. Tp. v. Moorhead*, 43 Iowa, 466; *Mickle v. Douglas*, 75 Iowa, 78. When the written lease was executed, it covered only the realty. It no more included those chattels than any other personal property belonging

to the tenant, and upon the demised premises at the time. By taking the new lease the tenant's rights to any personal property belonging to him were neither lost nor in anywise affected. This view has direct support in *Wright v. Macdonell*, 88 Tex. Sup. 140 (30 S. W. Rep. 907).

It is manifest from what we have said that the first and third interrogatories propounded should have been answered in the affirmative, and the other in the negative.—**AFFIRMED.**

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ALBERT HARRINGTON, Plaintiff and Appellant, FRANK REYNOLDS, Receiver, Appellant, v. ROSANNA FOLEY, JOHN C. FOLEY and ELIZABETH C. FOLEY.

**Deeds as Mortgages.** Defendant and mortgagor agreed that defendant should procure an assignment of the mortgage, the mortgagor to furnish part of the consideration, and foreclose it, and within a year thereafter the mortgagor, was to repay him the amount  
 1 advanced to procure the assignment, whereupon he was to assign to her the certificate of sale. Defendant procured an assignment  
 2 of the mortgage, foreclosed it, and bid in the premises in his own name, but the mortgagor failed to repay him the amount advanced within the time specified, and a sheriff's deed to the premises was issued to the defendant. *Held*, that defendant held the title to the property only as security for the money advanced by him.

**POSSESSION.** Under Code, 1873, section 1938, providing that the  
 5 mortgagor of real property shall retain the legal title and right of possession, the holder of the absolute title in fee to lands as security for a loan is not entitled to possession.

**REDEMPTION.** The owner of land to which another holds the title as  
 4 equitable mortgagee is entitled to the statutory period of redemption after a decree fixing the status of the parties.

**RECEIVER: Costs.** A receiver appointed at the instance of the plaintiff in an action to quiet title is, where the validity of his appointment is unquestioned and his report unobjected to, entitled to his commissions and the expenses of his receivership, even though the defendant sustains his claim to the right of possession of the property.

**PLEADING: Relief.** Damages sustained by defendant in an action to  
 7 quiet title, through the appointment of a receiver for the lands at plaintiff's request, cannot be recovered unless pleaded in the answer.

108	287
124	532
108	287
133	371

**Trusts: PAROL TESTIMONY.** Though the contract respecting the procurement of the mortgage was made in behalf of the mortgagor by an agent, who executed it in her name as principal, and part of the consideration for the assignment of the mortgage furnished on behalf of the mortgagor was in fact the agents money, the mortgagor's beneficial ownership of the premises could be established by parol, it not being an attempt by the principal to establish a trust in the agent.

*Appeal from Woodbury District Court.—HON. WILLIAM HUTCHINSON, Judge.*

WEDNESDAY, MAY 10, 1899.

SUIT in equity to quiet title, for an injunction, and the appointment of a receiver, for an accounting and other equitable relief. Defendants claim that plaintiff's title to the real estate is held as security for money advanced, and is in fact a mortgage; deny that plaintiff has any interest in the crops raised upon the premises; and ask judgment for damages. A receiver was appointed, who took possession of the real estate, harvested the crops, and sold them under orders of court. The trial court found that plaintiff held title to the land as security for the payment of four thousand dollars; that defendants were entitled to the crops taken by the receiver, and were further entitled to damages by reason of the receivership; dissolved the injunction which had theretofore been granted; discharged the receiver; and taxed up all the costs and expenses of the receivership to plaintiff. A judgment was also rendered against Rosanna C. Foley for the amount of the loan, with interest, and special execution was ordered for the sale of the property, thus giving defendants the statutory period of redemption. Plaintiff and the receiver appeal.—*Modified, affirmed, and reversed.*

*Charles A. Dickson* for appellants.

*Kennedy, Jackson & Kennedy* for appellees Rosanna C. Foley and John C. Foley.

*C. W. Taylor* for appellee Elizabeth C. Foley.

DEEMER, J.—Rosanna Foley and John C. Foley were for many years prior to the time this controversy arose the owners of the subject of the litigation,—a farm of about three hundred acres,—situated in Woodbury county, Iowa. They mortgaged the same to one Ormsby, trustee, to secure the sum of four thousand one hundred and seventy-five dollars. This mortgage matured June 1, 1892. About the time this mortgage matured, one Burd, who was Mrs. Foley's attorney, induced her to make a new loan of the Security Company of Hartford, Conn., for the avowed purpose of taking up the Ormsby mortgage. Burd received the money advanced by the Security Company, and afterwards absconded, without paying the Ormsby mortgage. The holder of the Ormsby mortgage was threatening foreclosure, and Mrs. Foley, anxious to defeat the Security Company, consulted another attorney, who advised her that the Ormsby mortgage should be secured by some one who was friendly to her, and a foreclosure made in such manner as to practically defeat the Security Company's mortgage. Acting upon this suggestion, Elizabeth Foley, a daughter of Rosanna, induced the plaintiff to furnish four thousand dollars, which, with six hundred and sixty-two dollars and eighteen cents, to be furnished by the Foleys, would procure the Ormsby mortgage. At the time a contract was drawn

1 up between the parties, which reads as follows:

"Whereas, an assignment has been made by R. S. Ormsby, trustee, and W. T. Tilford, beneficiary, of a certain mortgage executed by Rosanna Foley and John C. Foley, wife and husband, covering certain lands therein described, in Woodbury county, Iowa, which mortgage is recorded in Book 43 of Mortgages, page 285, in Woodbury County Records, to Albert Harrington, for the sum of four thousand six hundred sixty-two and 18-100 (\$4,662.18) dollars; and whereas, the mortgage bond covered by said mortgage has also been transferred to said Harrington; and whereas, Elizabeth



C. Foley has, in fact, furnished some of said money: This memorandum is made as evidence of the respective rights of said Harrington and said Elizabeth C. Foley, viz.: (1) Of the moneys so furnished as aforesaid the said Harrington has furnished the sum of four thousand (\$4,000) dollars, and the said Elizabeth C. Foley the sum of six hundred sixty-two and 18-100 (\$662.18) dollars; that being the amount due upon the said bond and mortgage to the first day of February, 1895. (2). That the said Harrington is to foreclose the said bond and mortgage, and has employed Chase & Dixon as attorneys for such foreclosure, and said foreclosure shall be had without expense to said Harrington. (3) For the four thousand (\$4,000) dollars paid by said Harrington he is to have back the principal and interest thereon at the rate of 8 per cent. per annum on or before one year from date, and upon payment of that sum he will assign the said bond and mortgage, or the judgment into which they may be merged, or the certificate of sale which he may have taken, as may be necessary, upon the payment to him of the said amount, and the said Elizabeth C. Foley is to have all excess of the amount received upon the said foreclosure. In case the premises should have been redeemed by the second mortgagee, or other party, the redemption money shall be proportioned as aforesaid. The said Harrington shall receive four thousand (\$4,000) dollars, with interest on said sum at eight per cent. (8 per cent.) per annum to the time of such redemption, and the said Elizabeth C. Foley shall receive all moneys in excess of such amount. The above-named parties have signed the memorandum this 2nd day of February, 1895. Albert Harrington. Elizabeth C. Foley." The money thus procured was paid to the holder of the Ormsby mortgage, and the note which it was given to secure, as well as the mortgage itself, was assigned to plaintiff Harrington. Shortly thereafter two actions were commenced by Messrs. Chase & Dickson, who were attorneys for Mrs. Foley, one to foreclose the Ormsby mortgage, and the other to set aside the mortgage given to the

Security Company. The foreclosure suit went to judgment on March 22, 1895, and the property was sold to plaintiff Harrington under special execution April 23, 1895. After the sale, and before the equity of redemption had expired, the Security Company, which was made a party to the foreclosure suit, and served with notice by publication, appeared, and filed a pleading, in which it claimed that its mortgage was superior to that of the Ormsby mortgage. Thus matters stood until February 8, 1897, when a stipulation was entered into, by the terms of which the Security Company withdrew its answer and disclaimed any interest in the premises in controversy. All litigation with reference to the mortgages being thus closed, plaintiff Harrington, on the eleventh day of February, 1897, took a sheriff's deed to the property. The Foleys made an effort to secure money with which to repurchase the land, or to repay plaintiff the amount of his investment, but, failing in this, plaintiff, on September 20, 1897, commenced this suit, in which he claimed to be the absolute owner of the property; that defendants were committing waste, and destroying the property, were making claim to the crops growing thereon, and otherwise injuring his estate. The defendants, as we have seen, deny the plaintiff's ownership, plead that he holds the title only as security for the repayment of the four thousand dollars advanced, and they also pray for damages done their property by the receivership.

It will thus be seen that the primary question for solution is, how does the plaintiff hold the title acquired under the sheriff's deed? The evidence leaves no doubt in our

minds that plaintiff, at the instance of Elizabeth C.

2 Foley, who was at all times acting for her mother,

Rosanna Foley, advanced four thousand dollars to assist in procuring an assignment of the Ormsby mortgage, to the end that the mortgage of the Security Company might be defeated, and the land preserved to the Foleys. Plaintiff did not intend to take title to the land. He advanced the money as a loan, and took the assignment of the mortgage

as security. True, he expected, and it was in effect, provided that he should be repaid within a year, but there is no provision in the written contract, nor is there any verbal evidence, that there should be a forfeiture of title in the event the money was not repaid. All parties expected that plaintiff should foreclose the Ormsby mortgage, as they were advised that this was the most effective method of attack upon the Security Company's incumbrance. The attack was successful, and plaintiff finally obtained title through the sheriff's deed. These facts demand the application of the old equitable doctrine, "Once a mortgage, always a mortgage." See 3

Pomeroy Equity Jurisprudence, section 1193, and 3 cases cited. Appellant contends that, as Elizabeth

Foley furnished part of the consideration for the assignment of the Ormsby mortgage, the interest which Roemma Foley has in the land, if she has any, is a trust, which cannot be established by parol evidence. Were we required to determine who in fact furnished these six hundred and some odd dollars, we would have some difficulty in arriving at a satisfactory conclusion; but this we are not called upon to do. Elizabeth Foley acted as the agent of her mother, and this fact was well known to plaintiff. The money may have belonged to Miss Foley, but, as she treated it as belonging to her mother, there is no legal objection to our so considering it. If she had made a gift of this to her mother, none of the parties to this suit would have any right to complain. And we may so treat it for the purpose of meeting the argument made by counsel. No one contends that there was any change in the arrangement or contract between plaintiff and defendants after the written contract was entered into; and as equity looks to the substance, rather than the form, of the transaction, we have no difficulty in concluding that plaintiff holds the sheriff's deed as security for the amount of money advanced by him, as well as for counsel fees and expenses incurred in the litigation to defeat the Security Company mortgage. As sustaining our conclusions,

see *Bank v. Coonrod*, 97 Iowa, 106; *Rogers v. Davis*, 81 Iowa, 730; *Pond v. Eddy*, 113 Mass. 149; *Libby v. Clark*, 88 Me. 32 (33 Atl. Rep. 657).

Appellant further contends that, if it be found that he holds the title as security, then a definite time should be fixed in which Rosanna Foley shall pay him the amount of his claim, and the trial court erred in giving her  
4 the statutory period of redemption; and he relies upon the case of *White v. Lucas*, 46 Iowa, 319. In that case the vendor brought action to have an absolute deed declared to be a mortgage, offered to pay the amount due to the vendee, and asked that his title to the premises be quieted. He asked to be allowed to pay his debt, and the court ordered him to do so. Defendant in that case asked no equitable relief, and we there said that equity required plaintiff to make payment of the amount due before he could have the deed transformed into a mortgage. Yet further we said that the petition asked no such relief as an equitable period of redemption, and that, under the circumstances, it would be inequitable to give it. The case is more nearly like that of *Brush v. Peterson*, 54 Iowa, 243, wherein it is held that a mortgagor, who had given an absolute deed as security, was entitled to the statutory period of redemption. That action was very similar to the one at bar, and is conclusive of the question now under consideration. See, also, *Radford v. Folsom*, 58 Iowa, 473; *Fisk v. Stewart*, 24 Minn. 97.

Again, plaintiff claims that he is entitled to the crops grown upon the premises during the year 1897. This all depends on whether or not the sheriff's deed should be treated as a mortgage. If a mortgage, then defend-  
5 ants were entitled to possession until after the expiration of the period of redemption from a proper foreclosure of plaintiff's equitable mortgage. Code 1873, section 1938. There was no stipulation that plaintiff should have possession, and he never demanded it until about the time

of the commencement of this suit. We do not think the parties at any time contemplated that plaintiff should have possession of the land as security for his loan. The receiver was appointed, and a temporary writ of injunction was granted, on the theory that defendant Rosanna Foley was guilty of waste and destroying the value of the premises. Defendants filed no motion to discharge the receiver, nor did they move to vacate the injunction. In their answer they asked damages, due to the fact that they were prevented from preparing the land for the crops of 1898, for time and money expended in procuring counsel and in attending court, and for loss in being prevented from harvesting, caring for, and marketing the crops of the year 1897.

The trial court found that Rosanna Foley was the owner and entitled to the possession of the crops raised during the year 1897, which were taken possession of and sold by the receiver, and to the proceeds thereof now in the hands of the said receiver; awarded judgment against plaintiff in the sum of forty dollars, and directed said receiver to pay defendant the sum of four hundred and thirty-eight dollars and

eighty-five cents, the amount received by him from  
6 the property taken into his possession, without deduction for expenses or for compensation to the receiver; discharged the receiver; and taxed all costs to plaintiff. Under the issues, tendered, this was error. The receiver made a report in which he showed that he had sold the property pursuant to an order of the court, that his expenses connected therewith amounted to the sum of one hundred and fifty-nine dollars and eighty-seven cents, and he asked for the sum of ninety dollars as compensation for his services. As no attack was made on the validity of his appointment, and no objections were filed to his report, he should have been allowed the sum asked; and, with this allowance deducted from his receipts, the available balance in his hands will be one hundred and eighty-eight dollars and ninety-eight cents, which sum should be paid to defendant by the receiver, as

there is no provision in the contract giving plaintiff a lien on the crops.

The award of damages to defendant as against the plaintiff was for pasturage on the premises during the fall and winter of 1897 and 1898. No such claim was made in the

answer, and it was error to allow it. The receiver  
7 accounted for the straw and cornstalks which were  
upon the land, and there is no evidence of any damage  
done to the land. As the plaintiff had no lien upon the crops,  
the court should have ordered the receiver to turn over the  
balance above found in his hands to the defendant Rosanna  
Foley, and should have dismissed the defendants' counter-  
claim for damages. It should also have approved the receiver's  
report, and allowed him the compensation asked, and further  
ordered that upon turning over to Rosanna Foley the balance  
thus found due, and filing her receipt for the same, the receiver  
should be discharged, and his bond exonerated. If there had been  
a direct attack upon the appointment of the receiver, a different  
question would arise, and the case might be ruled by *French v. Gifford*, 31 Iowa, 428. But, as there  
was no such attack, the case is governed by *How v. Jones*, 60  
Iowa, 70; *Radford v. Folsom*, 55 Iowa, 276; *Gallagher v. Gingrich*,  
105 Iowa, 237; *St. Paul Title Insurance & Trust Co. v. Diagonal Coal Co.*,  
95 Iowa, 551; *Jaffray v. Raab*, 72 Iowa, 335. The trial court was  
also in error in taxing the costs of the receivership to plaintiff.  
These fees and expenses should be paid out of the funds in the  
receiver's hands. The decree in so far as it finds the sheriff's deed  
a mortgage, and decrees a foreclosure and sale of the premises,  
is approved. The order made upon the receiver is reversed, and  
the judgment against plaintiff for damages for pasturage is also  
reversed. The case will be remanded for a decree in harmony  
• with this opinion. It follows that the decree is, on plaintiff's  
appeal, MODIFIED and AFFIRMED; on the receiver's appeal,  
REVERSED.

108 296  
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C. W. LEWIS v. D. A. EVANS, Appellant.

**Statute of Frauds: SALE OF CORN TO BE SHELLED.** Under Code, sections 4625, 4626, making evidence of an oral contract for the sale of personalty incompetent unless in case of a partial delivery or payment, except when the article sold is not at the time owned by the vendor, and ready for delivery, but labor, skill, or money are necessarily to be expended in producing or procuring the same, a contract for the sale of the corn to be shelled, and that unfit for shelling to be thrown out, is within the statute, as no labor was necessary to produce or procure the corn.

*Appeal from Calhoun District Court.*—HON. S. M. ELWOOD,  
Judge.

THURSDAY, MAY 11, 1899.

*Rose & Henderson* for appellant.

*M. R. McCreary* and *J. B. McCreary* for appellee.

LADD, J.—The averments of the petition are, in substance, that the defendant orally agreed to pay the plaintiff ten cents a bushel for one thousand five hundred bushels of corn delivered at Lohrville, to be shelled from a crib selected by the defendant, and corn unfit for shelling to be thrown out; that, in pursuance of this understanding, the defendant pointed out the crib, and the plaintiff sorted and shelled the corn therefrom, which he would not otherwise have done, and undertook to deliver it as agreed, when defendant refused to accept it; that plaintiff has been damaged in the sum of fifty-two dollars and fifty cents. The demurrer of the defendant was sustained in the justice's court on the ground that the contract was within the statute of frauds, but this ruling was reversed in the district court, and the cause certified as provided in section 4110 of the Code. As no part of the property was delivered, and no part of the price paid,

unless labor, skill, or money was necessarily to be expended in producing or procuring the shelled corn, the agreement is within the statute of frauds. Code, sections 4625, 4626. In *Mighell v. Dougherty*, 86 Iowa, 484, it was held that an oral contract to deliver oats in a merchantable condition at an elevator, raised, but not harvested or threshed, was within the statute. This was on the ground that the seller was not thereby required to do different than he would have done in the ordinary course of his business. His care of the oats was not affected by the contract of sale, and this rule was laid down: "If the grain is sold, and no part of it delivered, and no part of the price is paid, and the contract is not in writing, and the labor, skill, and money which is necessary to be expended upon it to fit it for market is such only as, in the ordinary course of the defendant's business, he would be compelled to expend upon it, or devote to it, in order to preserve and care for it as a good husbandman, the case is purely a sale, and comes within the statute." This does not cover the case at bar. Corn is marketable when not shelled, and a good husbandman quite as often sells it "in the ear" as when shelled from the cob. We may, then, look somewhat to the authorities, in order to ascertain the principle which shall govern. Our statute, barring the exception in section 4626, is like that of England prior to Lord Tenterden's act, with this difference as to proof: Here no evidence of the oral contract can be received, while there the contract is not "allowed to be good." In *Clayton v. Andrews*, 4 Burrows, 2101, Lord Mansfield adjudged an oral contract to deliver a quantity of wheat at a future day, not within the statute because the wheat was unthreshed and unfit for delivery at the time of the bargain. The decision was put on the ground that the statute did not include executory contracts, following *Towers v. Osborne*, 1 Strange, 506. But in *Rondeau v. Wyatt*, 2 H. Bl. 63, this distinction was abandoned, and since then has been disregarded. That case not only held the statute to apply to executory contracts as well as those immediately



to be performed, but also that the purchase of an article manufactured by the seller in his ordinary course of business, to be delivered in the future, though not then existing, was within the statute. There the oral agreement was for the future delivery of three thousand sacks of flour, not made. See, also, *Cooper v. Elston*, 7 Term R. 14. In *Garbutt v. Watson*, 5 Barn. & Ald, 613, which was for the nonacceptance of one hundred sacks of flour, to be manufactured by the seller, who was a miller, *Clayton v. Andrews*, *supra*, was distinctly disapproved, and recovery denied. See, also, *Smith v. Surman*, 9 Barn. & C. 561; *Groves v. Buck*, 3 Maule & S. 178; *Wilks v. Atkinson*, 6 Taunt. 12; *Lee v. Griffin*, 1 Best & S. 272. The principle of the decision in the last case is thus announced by Blackburn, J.: "If the contract be such that it will result in the sale of a chattel, then it constitutes a sale; but if the work and labor be bestowed in such a manner as that the result would not be anything that could be properly said to be the subject of sale, the action is for work and labor." A dentist was denied recovery from an executor for a set of artificial teeth made for a deceased lady. However philosophical and comprehensive the rule may be, its adoption is precluded by our statute. But it and other cases cited overthrow *Clayton v. Andrews*, *supra*, and for this reason that case is no longer an authority. In *Eichelberger v. McCauley*, 9 Am. Dec. 515, the court of appeals of Maryland, in 1821, in reluctantly following *Clayton v. Andrews*, said: "The distinction thus recognized the court do not intend shall be pushed further than the circumstances of the *Case of Clayton and Andrews* will justify, and they must not, therefore, be understood to extend it to cases where the articles sold are not to be prepared for delivery by work and labor, and where the work and labor may not be considered in some measure a part of the contract." In *Downs v. Ross*, 23 Wend. 270, an agreement for the sale of seven hundred and fifty bushels of wheat, belonging to the seller, part to be threshed and the rest to be cleaned more thoroughly, to be

delivered in six days, at a fixed price, was held to be within the statute. The rule in that state seems to be that a contract for an article existing in *solido* is held to be within, and for a thing not yet made, but to be delivered in the future, without, the statute. *Crookshank v. Burrell*, 18 Johns, 58 (9 Am. Dec. 187); *Sewall v. Fitch*, 8 Cow. 215; *Parsons v. Loucks*, 48 N. Y. 17; *Cooke v. Millard*, 65 N. Y. 352. This rule is thus criticised in Browne on Statutory Frauds, section 302: "It may often be a matter of great nicety whether the labor to be applied to the article really amounts to constructing it or only repairing it; as, for instance, where articles are kept on hand by manufacturers in parts or pieces, ready to be put together. And it is difficult, also, to see the reason for the distinction, for in either case the article is incapable, at the time, of being delivered according to the contract. It is as much so when incomplete as when not existing." The effect of the Massachusetts decisions is thus stated in *Goddard v. Binney*, 115 Mass. 454: "That a contract for the sale of articles then existing, or such as the vendor, in the course of his business, manufactures or produces for the general market, whether on hand at the time or not, is a contract for the sale of goods, to which the statute applies. But, on the other hand, if the goods are to be manufactured especially for the purchaser, and upon his special order, and not for the general market, the case is not within the statute." *Mixer v. Howarth*, 21 Pick. 205 (32 Am. Dec. 256); *Gardner v. Joy*, 9 Metc. (Mass.) 177. The rule thus clearly stated quite generally prevails in this country. *Flynn v. Dougherty*, 91 Cal. 669 (27 Pac. Rep. 1080); 8 Am. & Eng. Enc. Law, 709; 3 Parsons Contracts (6th ed.) 59; *Hientz v. Burkhard*, 29 Or. 55 (43 Pac. Rep. 866, 54 Am. St. Rep. 777); *Cason v. Cheely*, 6 Ga. 554; *Meincke v. Falk*, 55 Wis. 427 (42 Am. Rep. 722, 13 N. W. Rep. 545); *Phipps v. McFarlane*, 3 Minn. 109 (Gil. 61, 74 Am. Dec. 743); *Hight v. Ripley*, 19 Me. 137; *Pratt v. Miller*, 109 Mo. 78 (32 Am. St. Rep. 656, 18 S. W. Rep. 965); *Finney v. Apgar*, 31 N. J. Law, 266;

*Pilkin v. Noyes*, 48 N. H. 294 (97 Am. Dec. 615). In the last case the sale of three acres of potatoes was involved, and it was held proper to "leave it to the jury, in view of all the circumstances of the case, to find whether the contract was essentially for the work and labor and materials of the defendant in raising the potatoes, so that he was bound himself to raise them, or whether it was substantially a sale of potatoes, which he might raise himself, or procure by purchase or otherwise. If it was the former, it would not be within the statute of frauds; but, if the latter, it would be." See *contra*, *Watts v. Friend*, 10 Barn. & C. 446. In *Hardell v. McClure*, 1 Chand. 271, wheat to be threshed was to be delivered at a particular mill, and the court, regarding *Clayton v. Andrews* overruled by *Garbutt v. Watson*, and later English cases, and *Eichelberger v. McCauley* as resting on that authority alone, followed *Downs v. Ross*, *supra*, and adjudged refusal to give the following instruction error: "That the wheat existing in *solido* at the time the contract was made, and not having to be raised or manufactured, and though unthreshed, it was a contract within the statute of frauds, and the plaintiff could not recover." This decision is expressly approved in *Meincke v. Falk*, *supra*, where it is said: "After a very careful examination of the authorities, we are induced to believe that *Hardell v. McClure*, *supra*, was well decided, not only by force of reason, but upon the weight of authority, for it was clearly not a contract for special labor in manufacturing anything, but a contract to sell and deliver a certain quantity of wheat." See, also, *Clark v. Nicols*, 107 Mass. 547. The supreme court of Minnesota, in *Brown v. Sanborn*, 21 Minn. 402, held a contract for the purchase of all the flax straw to be raised from forty-five bushels of flax seed, to be "delivered in a dry condition, free from grass, weeds, and all foreign substances," within the statute. We are inclined to the conclusion reached in *Downs v. Ross*, *Hardell v. McClure*, and *Brown v. Sanborn*. They are like the case at bar in that the work to be done was not of a kind to change either the

form or the character of the thing sold. The corn was in existence at the time of the sale, and no change was to be wrought in it, but rather its separation from the substance connected therewith. *Phipps v. McFarlane*, 3 Minn. 109 (Gil. 61, 74 Am. Dec. 743). The sale was of shelled corn. The labor to be expended did not pertain to its production, but consisted in the rejection of that of poorer quality, and the removal of the corn from the cobs. It had already been produced, and the labor involved simply related to its preparation for the market. As no labor was necessarily to be expended in producing or procuring the shelled corn, the sale was within the statute.—REVERSED.

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A. J. COOPER v. B. F. COOK, Appellant.

**Right of Redemption: ABANDONMENT.** After the rendition of a decree entitling a land owner to redeem from a tax sale, he paid the redemption money to the clerk, but the tax sale purchaser  
3 refused to accept it, because he thought there was no redemption, whereupon the former moved to compel a conveyance from the latter through the clerk, and the motion was denied, whereupon the former withdrew his money, and the latter and his grantees remained in possession for 15 years. *Held*, that the former had abandoned his right to redeem.

**Correction of Decree in Blank.** The incompleteness of a decree  
1 requiring a conveyance of land on payment of \$———may be  
2 cured by order fixing the amount, made on a motion therefor.

**Appeal: OBJECTION BELOW.** One cannot on appeal first object that  
4 there was a departure from the prescribed rules of pleading.

*Appeal from Taylor District Court.*—HON. W. H. TEDFORD,  
Judge.

THURSDAY, MAY 11, 1899.

An action to quiet title to the west one-half of the northwest one-fourth and the northwest one-fourth of the southwest one-fourth of section 7, township 69, range 32 west of

the fifth principal meridian, in Taylor county. Plaintiff's title is based on a tax deed to one E. Manning, dated December 12, 1872. At the date of the sale the legal title to the land was in one John B. Cook and the defendant, each an undivided one-half. When the tax deed issued, the defendant was a minor, and attained his majority October 8, 1875. In 1876 he instituted a suit in Taylor county against the then holder of the tax title and others, asking an order permitting him to redeem his interest from the tax sale, and on the trial a decree was entered that defendant should pay into court, within ninety days from May 31, 1877, for

the use of one Stout, who then owned the tax title,  
1     \$———, being one-half of the improvements, taxes, penalty, costs, and interest expended in behalf of the premises; and that defendants make to plaintiff therein a deed therefor. No money was paid during the ninety days, and at the November term of court (it being the next term after the May term when the decree was entered) Cook presented a motion for the court to fix the amount to be paid for redemption (the amount being left blank in decree), and the court sustained the motion, and the amount was thereafter paid into court, but was never accepted by Stout, and in October, 1880, Cook presented his motion to the court asking that the court require the clerk, as commissioner, to convey the premises to him in accord with the terms of the original decree. The motion was resisted on several grounds, and overruled. Thereafter, on the thirty-first day of December, 1880, Cook's attorneys withdrew the redemption money from the clerk, and Stout having conveyed the premises to the plaintiff, Cooper, in 1896, he brings this action to quiet his title. The district court gave judgment for plaintiff, and the defendant appealed.—*Affirmed*.

*Jackson & Miller* and *C. C. & C. L. Nourse* for appellant.

*Mark Atkinson* for appellee.

GRANGER, J.—The arguments deal with the question of the legal effect of the order of the court on the motion by Cook for an order requiring the clerk, as commissioner, to make him a deed, it being claimed that it was an adjudication that became final and conclusive, as no appeal was taken from it. We are disposed to pass that question, and dispose of the case on one more nearly involving the merits.

2 Assuming the original decree to have been incomplete, in that it did not fix the amount necessary to be paid in order to redeem, it was certainly complete after the court sustained a motion to fix the amount; and it was done. It was then that Cook entered on its performance by paying to the clerk the amount. It is appellant's position that

3 the payment fixed the fact of redemption, so that a withdrawal of the money thereafter would not affect it; that, whatever might be the rights of the parties as to the money, the land was redeemed from the sale, and belonged to Cook. The issues and the record disclose that Stout was refusing to accept the money because, as he thought, there was no redemption. Cook was urging its acceptance, or his right to a deed, because, as he thought, there was a redemption. It was because of this situation that Cook presented his motion to compel a conveyance through the clerk, which the court denied.

No one has claimed, nor do we think such a claim could well be made, that, with this situation, Cook could not abandon, voluntarily, his redemption; that is, take his money and leave the land to Stout. The issues in the case arise, practically, on the answer by Cook, and the reply, wherein Cook sets up the facts to show a redemption, and asks affirmative relief, and plaintiff, by reply, pleads the withdrawal of the money after the refusal of the court to order a conveyance, and the occupation by plaintiff and his grantor for fifteen years. That Cook, by withdrawing the money, intended to undo what had been done in the way of redemption, and

abandon any relief under the decree of the court, admits of no doubt. Even though what he had done could be enforced as a legal redemption,—which we do not decide,—Cook surely had the right, with the consent or acquiescence of Stout, to surrender all claim under the decree; that is, he could surrender what was his legal right, or abandon it, and take to himself what, if there was an actual redemption, belonged to Stout, if Stout assented to it. That is the situation here. After the ruling on the motion, Cook, instead of further insisting on his right to a deed, took the money, intending, evidently, to undo what he had done, and made no further attempt to secure a title; and Stout, without question, accepted the situation; and thus for fifteen years the parties acted upon that undoubted understanding. Under such circumstances there is no redemption available to Cook as a basis for holding the land. There is something said in argument as to the pleadings,—a plea of the statute of limitations being a reply. We have not touched that question, but have considered other matters pleaded in the reply.

4 It is to be said that the pleadings are a departure from the prescribed rules, there being a petition, answer, reply, and replication, and not such a division of the subject matter of the pleading as the law contemplates. However, the parties proceeded to trial on the issues thus made without question. The judgment is **AFFIRMED**.

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PLYMOUTH COUNTY V. E. KERSEBOM *et al.*, Appellants.

**County Treasurer's Bond: LIABILITY OF SURETIES: Expiration of term.**

Sureties on a county treasurer's bond, conditioned that their principal will properly pay over to the person entitled all money which may come into his hands by virtue of his office, and account for all balances remaining in his possession at the termination of his office, are liable for his defalcation after the expiration of his term of office, and before his successor qualifies, since the bond requires the payment of the money to some one authorized to receive it, and, that not being done, the sureties continued liable.

*Appeal from Sioux District Court.*—HON. WILLIAM HUTCHINSON, Judge.

THURSDAY, MAY 11, 1899.

ACTION at law to recover of E. Kerseboom, late treasurer of Plymouth county, and the sureties on his official bond, an amount which Kerseboom is alleged to have received as treasurer, and for which he has not accounted. There was a trial, and a verdict for the plaintiff by direction of the court. From the judgment rendered on the verdict the defendants appeal.—*Affirmed.*

*P. Farrell, McDuffie & Keenan, and Sammis & Scott* for appellants.

*John Adams and Ira T. Martin* for appellee.

ROBINSON, C. J.—The defendant Kerseboom was elected and qualified as treasurer of the plaintiff for the term which commenced in January, 1894, and served as treasurer during the full term. At the general election held in the year 1895 he was re-elected, but failed to qualify for the second term. The law at that time in force required him to qualify by the first Monday of January, 1896, which was the sixth day of the month, and provided that a failure to so qualify should be deemed a refusal to serve. Code 1873, sections 685, 686. Kerseboom continued to act as treasurer, however, until the twenty-first day of January, when he absconded. It is shown by uncontradicted evidence that on the twenty-third day of January, when possession of the treasurer's office was taken by the county auditor, the records of the office showed that Kerseboom had received nearly seventeen thousand dollars more than he had accounted for, and of that amount thirteen thousand one hundred and fifty-eight dollars and ninety-eight cents were collected prior to the close of business on the sixth day of January. The verdict and judgment were for the



sum last mentioned, and interest. The appellants contend that Kerseboom's first term of office expired on the sixth day of January, 1896, that thereafter he was merely an officer *de facto*, and the sureties on his official bond are only liable for money collected by him and misappropriated during the term of office covered by the bond, that the evidence fails to show that any of the funds in controversy were taken during Kerseboom's term of office, and therefore that it was not shown that the sureties are liable. It is said that the failure of Kerseboom to qualify anew before the seventh day of January created a vacancy in his office, and that possession of it should then have been taken by the county auditor, as required by section 788 of the Code of 1873; that it will be presumed that the funds for which he was responsible were in his possession at the end of his term, and that the failure of the board of supervisors to prevent his acting as treasurer after the end of his first term, before he had qualified for the second, and the failure of the county auditor to take possession of the office as required by law, would not have the effect to make the sureties liable for wrongs committed after the expiration of the first term. The argument thus made is ingenious, but does not, we think, fully meet the case presented. The conditions of the bond of Kerseboom, as signed by the sureties, were that he should, as treasurer, "render a true account of his office and doings therein to the proper authorities, when required thereby or by law;" that he should "properly pay over to the persons or officers entitled thereto all money which may come into his hands by virtue of his office, and shall promptly account for all balances of money remaining in his hands at the termination of his said office, and shall hereafter exercise all reasonable diligence and care in the preservation and lawful disposal of all moneys, books, papers, and securities and other property appertaining to his said office, and deliver them to his successor, or to any other person authorized to receive the same;" and that he should "faithfully and impartially, without fear or favor, fraud or oppression, dis-

charge all the duties now or hereafter required of his office by law." Those conditions, so far as they are involved in this case, could only have been fulfilled by the payment to the successor of Kerseboom, or to some other officer or person entitled thereto, of the money in controversy. It cannot be said that he paid the money to his successor by retaining it after his right to act as treasurer was at an end, even though he continued to so act. *Wapello County v. Bingham*, 10 Iowa, 39. It will not be claimed that he could have discharged the obligation of the bond by paying the money, after the termination of his office, to another, who had assumed, without any right whatever, to act as treasurer, and yet the case, as presented by the appellants, does not differ in principle from the one suggested; and, if it be true that Kerseboom had all of the money in question in his possession until the close of the sixth day of January, that fact would not relieve his sureties from liability, even though he had the money in his possession on the following day, when he acted as treasurer without right. The conditions of the bond required the payment of the money in question to some one authorized to receive it, and, since that has not been done, the sureties continue to be liable on the bond. Since there was no dispute in regard to the material facts involved in this case, the district court properly directed a verdict for the plaintiff, and its judgment is **AFFIRMED**.

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DES MOINES BRICK MANUFACTURING COMPANY, Appellant,  
v. WILLIAM T. SMITH *et al.*, WILHELMINA LEVEKE,  
Intervener.

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117 308

**Public Improvements: LIENS: Priority.** The lien of street-paving certificates inferior in point of time to a lien based upon the certificates issued for curbing the same street is not rendered superior 1 to the latter lien by Laws Twenty-first General Assembly, chapter 168, section 13, providing that special assessments for paving, curbing, and sewerage streets shall be a lien upon the abutting

property from the commencement of the work, to remain until fully paid, and shall have precedence over all other liens excepting ordinary taxes.

**Paving Assessment: INTEREST.** Acts Twenty-second General Assembly, chapter 5, amending Acts Twenty-first General Assembly, chapter 168, section 12, provides that assessments for paving streets shall be payable to the county treasurer, with 6 per cent. interest, and collected in the same manner and bear the same penalties as  
2 provided for the collection of other taxes, Code 1873, sections 478, 479, provides that assessments may be collected by suit either in the name of the municipality or the person to whom it shall have directed payment, and that in case of default in payment the municipality may recover, in addition to the amount assessed and interest at 10 per cent., 5 per cent. for expenses of collection. *Held*, that a private person suing to recover the assessment is entitled to only 6 per cent. interest.

*Appeal from Polk District Court.*—HON. C. P. HOLMES,  
Judge.

THURSDAY, MAY 11, 1899.

ACTION in equity to enforce and foreclose a lien upon real estate of defendant Smith. The lien is claimed under certain certificates issued for paving a street upon which the property abuts. The intervener claims, and by cross bill seeks to foreclose, a lien in her favor, based upon certificates issued for curbing the same street. The contest is as to the priority of these liens. The district court gave judgment in intervener's favor. Plaintiff appeals.—*Affirmed.*

*Guernsey & Granger* for appellant.

*A. P. Chamberlain* for intervener.

*Connor & Weaver* for other appellees.

**WATERMAN, J.**—The only issue presented is between plaintiff and intervener, and it relates to the priority of their respective liens. Which is to have precedence of the other is the only question in the case. The certificates held by intervener were issued in payment for curbing East Grand

avenue in the city of Des Moines. The contract for this work was let about August 19, 1891, and the work was completed during that year. The certificates therefor were issued March 16, 1893. The certificates held by plaintiff were given, as already said, in payment for paving the same street. The contract for this work was let about April 15, 1892; the labor was done during the year 1893, and the certificates were issued May 19th of that year. It is apparent that the lien of the intervener was first in point of time. The contention of plaintiff is that its later lien supersedes the other. The rule, in the absence of statutory provision to the contrary, is that liens take precedence in the order of time; the first in point of time being superior. The only exception to this that we now recall is a bottomry bond, and it is expressly recognized by text writers as differing in this respect from all other common law liens. 3 Kent Commentaries, 437. This order of priority will not be disturbed or altered, unless expressly provided by statute. *Smith v. Skow*, 97 Iowa, 640; *Bibbins v. Clark*, 90 Iowa, 230.

We come, then, to an investigation of the statutory provisions with relation to liens of the character of those involved. It is conceded that this case is governed by chapter 168, Laws Twenty-first General Assembly. Section 13 of that act is as follows: "Said assessments with interest accruing thereon shall be a lien upon the property abutting upon the street or streets on which any such improvement is made from the commencement of the work, and shall remain a lien until fully paid, and shall have precedence over all other liens, excepting the ordinary taxes, and shall not be divested by any judicial sale, provided that such lien shall be limited to the lots bounding or abutting on such street or streets, and not exceeding in depth therefrom one hundred and fifty feet." It is upon the construction of this section that the rights of the parties depend. If the section stood alone, there would be much warrant for the claim made by appellant that

the last lien so given displaced all other previous liens upon the property. But, in order to properly interpret this part of the chapter, we must look to its context. This act begins with a grant of power to certain cities to levy special assessments for paving, curbing, or sewerage streets. These three distinct kinds of improvement may be made and paid for by levying the cost against abutting property. As the law proceeds, it treats of these improvements as a class. Nowhere does it distinguish between them, or attempt to set off one as against the others. When section 13 is reached, the lien for such cost is provided for, not of either one of these improvements, but of the whole class, and it is said such lien "shall have precedence over all other liens, excepting ordinary taxes." Looking at it in this way, it would seem clear that the "other liens" mentioned are liens of some other class or kind. There appears to be good reason, too, for so construing this act. It would be something unusual to say that the municipality might, by its own voluntary act, displace a lien which, under the law, it had given. We are asked now to hold that after the city, through its acts, has given to one party a lien, it can without his consent and against his will, displace, and perhaps destroy, it, by creating another lien in favor of some other person. This right may be conferred by statute, but it should be done in unmistakable language before we would feel justified in so holding. Such a provision, too, would have a tendency to defeat the whole purpose of the statute. It is safe to say that contractors would hesitate to accept these certificates, if they knew the city had power at any time to destroy the lien by which their payment is secured. It may be thought, as counsel in substance asserts, that the benefit to the property of the later improvement would add to the security of the earlier lien, and make it as safe in second place as it was originally in the first. It is hardly necessary to say that the immediate benefit to property, from improvements of this kind, is in many instances more fanciful than real.

In the present case, the cost of the improvement seems to exceed the value of the property after the work is done. The property owner is not without reason, if under such circumstances he regards the improvement as a burden rather than a benefit. It can hardly be said in any case that the real estate at once takes on an additional value equal to the cost of the improvement. But, however this may be, if the paving benefited the real estate in question by increasing its price, there is quite as much justice in compelling plaintiff to rely upon this for his security, as for holding that such fact will support the right to displace the lien of the intervener. After all, the question is one of statutory construction only. The lien of intervener is first and paramount, unless the statute otherwise provides; and this we think is not the case. One argument used by appellant is that, if intervener had foreclosed her lien and become the owner of the property before the paving was done, she would have been obliged to pay for such improvement. This is true. But we might respond by saying that if one who holds a mortgage upon property on which intoxicating liquors are sold forecloses his lien, and becomes the owner of the property before the mulct tax is levied, he will be liable for its payment, and yet we held that the lien of such tax would not take precedence of a prior existing mortgage. *Smith v. Skow, supra*. The only case cited by appellant which we regard as in conflict with our views is *Burke v. Lukens*, 12 Ind. App. 648 (40 N. E. Rep. 641), and this is by an intermediate court. It is not an authority, and we must say that we are not inclined to accept the line of reasoning pursued as a sufficient argument to sustain the conclusion.

II. Another ground of complaint by appellant is that the court allowed interest upon its judgment at the rate of six per cent. only, when the law provides for ten per cent. in case an action is brought for the recovery of such taxes.

2 The adverse parties here make no argument on this matter of interest. To the intervener it is manifestly

immaterial, if she is successful in maintaining the priority of her claim, and it seems, as already said, that the face of the liens is sufficient to exhaust the property, and the owner is indifferent as to what may be added in the way of interest. Section 12, chapter 168, Acts Twenty-first General Assembly, which provided for interest, was amended by chapter 5, Acts Twenty-second General Assembly, and is as follows: "Said assessment shall be placed on the tax duplicate or list of the county and shall be payable at the office of the county treasurer in seven equal installments with interest at six per centum from the date of the assessment upon the unpaid portion thereof, the first of which, with interest on the whole amount at six per cent. shall be payable at the first semi-annual payment of taxes next succeeding the time said assessment is placed on said duplicate and the others annually thereafter. And said assessment shall be collected in the same manner and bear the same penalties when delinquent as now provided by law for the collection of other taxes." The rate of interest is here fixed at six per cent. The closing lines, in which it is stated that such taxes shall bear the same penalties when delinquent as ordinary taxes, relate, as we construe them, to cases where the collection is made by the treasurer, and have no application to instances of this kind, where extraordinary means are adopted. Appellant bases its claim on sections 478, 479, Code 1873. In these sections it is provided that there may be a recovery by suit against the owner, and the lien thus enforced. And in section 479 it is said in such action "any municipal corporation may be entitled to demand and recover in addition to the amount assessed and interest thereon at ten per cent. from the time of the assessment, five per cent. to defray the expenses of collection," etc. This added burden is in the nature of a penalty. It is given to the municipal corporation only in case it seeks to enforce payment of the assessment by civil action; and there is strong reason for saying that no such action will lie on the part of the city until it has paid its contractors. *City of Burlington*

*v. Quick*, 47 Iowa, 222. We are not inclined to extend the provision beyond the strict letter of its terms. This action is not by the city; therefore this additional interest cannot be claimed under the section last mentioned. The decree of the trial court was in all respects right, and it is **AFFIRMED**.

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THE HANEY & CAMPBELL MANUFACTURING COMPANY,  
Appellant, v. THE ADAZA CO-OPERATIVE CREAMERY  
COMPANY.

106	313
112	671
108	313
144	557

**Contracts of Partnership: RELEASE: Estoppel.** A co-partnership which has taken possession of a creamery plant by its proper  
1 officers and is using the same, cannot relieve itself from its  
obligation to pay the contract price, nor relieve its assets from  
6 the lien, because some of the signers of the contract who did not  
sign collusively and who have taken no part in the management  
of the business and have never become partners have been released  
from their liability by the assignee of the contract.

**RELEASE: Forgery.** Where subscribers to a contract to build a plant  
form an association, and accept the plant and operate it, the  
1 association cannot defend against an action on the contract for  
2 the price, because of forgery of some of the subscriptions, this  
4 being neither an action to rescind or against the original signers.

**RELEASE OF OBLIGATIONS.** A release by a contractor of one of the  
5 parties to the contract from liability thereunder, intended merely  
as a settlement of the liability, and a promise not to sue him, is  
not a technical release which would release the co-obligors.

**Liens: ASSIGNMENT OF CONTRACT.** An assignee of a contract for the  
erection of a creamery who furnished the material and performed  
1 the labor is entitled to a lien for the amount due either as a con-  
2 tractor or as a sub-contractor, where nothing was paid to the  
8 original contractor who has waived all claim under the contract,  
and no part of the work was done by him under the contract.

**Appeal: ABSTRACTS: Transcripts.** Denials and counter denials have a  
new effect under the new rules. All specific denials are now  
7 settled by a transcript which is ordered on application of the  
appellant.

*Appeal from Greene District Court.*—HON. S. M. ELWOOD,  
Judge.



THURSDAY, MAY 11, 1899.

SUIT in equity to establish and foreclose a mechanic's lien. The defendant interposed a number of defenses, which will be referred to in the opinion. The trial court dismissed the petition, and plaintiff appeals.—*Reversed*.

*Owen Lovejoy* for appellant.

*Rose & Henderson* for appellee.

DEEMER, J.—In March of the year 1894, one C. H. Freeman entered into a contract with Albert Head and others, whereby he undertook to build, according to certain plans and specifications, a creamery plant at or near the town of Adaza, Iowa, for the agreed price of five thousand two hundred and fifty dollars, payable in cash when the plant was completed. The obligation on the part of Head and others was as follows: "We, the subscribers hereto, party of the second part, hereby agree and covenant to pay the above amount of \$5,250 to said first party, in cash, for said creamery or butter factory when completed. It is hereby agreed and understood that said building shall be completed within the time stated above in this contract after the amount of \$5,250 is subscribed. Any portion of the amount subscribed herein, and not paid according to the contract shall bear interest at the legal rate. As soon as the above amount, \$5,250, is subscribed, or within ten days after, we, the subscribers, hereby agree and covenant to incorporate under the laws of the state as herein provided, and we hereby agree to fix the capital stock at not less than the amount of \$5,250, to be divided in shares of \$100 each. Stockholders of said association to be held liable only for the amount of shares subscribed by them. The parties of the second part agree among themselves to appoint an executive committee to designate such land to the first party, and to confer with the first party from time to time

during the erection of said factory, and to accept and receive the same, when completed, in substantial accordance with these specifications. It is hereby expressly understood and agreed that this contract is completed when the amount of \$5,250 is subscribed \* \* \* for the faithful performance of our respective parts of the above contract, each binds himself, his heirs, executors, administrators, and assigns." The contract was signed by "Freeman, per C. E. Lee, Agent, Party of the First Part," and concludes in this manner: "We, the undersigned, subscribers to the foregoing articles of agreement, as party of the second part, hereby subscribe for the number of shares of stock set opposite our respective names for a creamery or butter factory to be built at or near Adaza, Greene county, Iowa, according to the foregoing plans and specifications on contract, plans form 6, C. H. F., which is made a part of the foregoing contract; and the said party of the second part agrees to pay for said factory as specified in said contract of plans form 6, C. H. F., which is made a part of said contract, or as may hereafter be specified in writing, and agreed to by the party of the first part.

The Second Party.....	No. of Shares	Amount of Stock after Incorporation.
Albert Head.....	8	\$300 00

This is followed by more than fifty other signatures, designating the number of shares for which each subscribed and the amount of stock after incorporation. The total amount subscribed was five thousand seven hundred and seventy-five dollars. Shortly after the making of the contract, and before any work was done thereunder, Freeman assigned the contract to plaintiff, and plaintiff proceeded to erect the factory at a place designated by the subscribers to the agreement. An executive committee representing the subscribers to the instrument accepted the plant when com-

pleted, and plaintiff has collected from those who signed the instrument four thousand nine hundred and ten dollars and seventy-three cents, leaving a balance due and unpaid in the sum of three hundred and thirty-nine dollars and twenty-seven cents. This suit is to collect that balance, and to establish and foreclose a mechanic's lien against the property. The subscribers did not incorporate as agreed, but they took possession of the property and proceeded to operate the same under the name of the Adaza Co-operative Creamery Com-

pany; and the action is against this association or  
1 co-partnership. The defenses pleaded are, *first*, that the signatures of some of the subscribers are forgeries; and that Freeman falsely and fraudulently represented to those who signed, after the forged signatures were placed upon the paper, that they were genuine. They further plead that Freeman was the principal contractor, and that plaintiff is not entitled to a lien as a subcontractor, because it did not comply with the statutes authorizing and preserving such lien, and that the assignment of the contract did not carry Freeman's right to a lien, if he ever had any such right. They also claim that some of the subscriptions were taken with the secret, fraudulent, and corrupt understanding that the makers would not be bound for the full amount thereof, and with intent to induce others to sign; that these subscribers paid but a small part of the amount subscribed by them, and that plaintiff is now endeavoring to collect the full amount from others who signed, relying upon the fact that all were bona fide subscribers; that plaintiff accepted from some of the subscribers but part of the amount subscribed by them, and released them from all further liability on account of their subscriptions, and thereby released all others from liability. Plaintiff pleaded in reply an estoppel, based on the conduct of the subscribers in accepting the plant after its completion. The

record discloses the following facts, in addition to  
2 those heretofore stated: Plaintiff furnished all the labor, material, and machinery necessary for the com-

pletion of the plant, and turned it over to the subscribers in accordance with the terms of the contract. Jesse Johnson, the ninth name among the list of subscribers to the contract, is a forgery, and was placed thereon by Freeman without authority. John Cavanaugh, whose name appears among the last, did not sign the paper. Another subscription, purporting to be made by A. C. Griffith, was really the subscription of Freeman himself. Griffith was a buttermaker who attended to the plant until it was turned over to the subscribers, and he never paid anything on his subscription. Albert Head and his two sons, R. C. and M. M. Head, appear to have signed the paper, and have marked opposite their names the aggregate sum of five hundred dollars. These subscriptions were settled by plaintiff for the sum of two hundred and fifty dollars, and the Heads were released from all liability thereon. This was done because Head claimed and represented that his sons had not, in fact, signed the paper, and that their signatures were unauthorized. Plaintiff gave Head a receipt in full at this settlement for the five hundred dollars, and released the Heads, father and sons, from all further liability on the contract. When the building was accepted, the following paper was drawn up and signed by plaintiff's agent: "Whereas Albert Head, P. B. Olmstead, M. M. Reading, and others have, by previous written and oral agreement with one C. H. Freeman, contracted, obligated, and agreed to pay to the said C. H. Freeman the sum of \$5,250, the said C. H. Freeman contracting, obligating, and agreeing on his part, for and in consideration of the payment of the said \$5,250 as agreed upon, to build, erect, and construct a certain creamery building at Adaza, Iowa, as shown by aforesaid contract, obligation, and agreement; and whereas, the said C. H. Freeman, on the 31st day of March, A. D. 1894, assigned the aforesaid contract, obligation, and agreement to the Haney & Campbell Manufacturing Company, of Belleview and Dubuque, Iowa; and whereas, there are certain claims, liens, and debts due upon and against said creamery, and which have been con-

tracted by the said C. H. Freeman and his agents in and about the construction and erection of said creamery for lumber and materials, iron, tin, brick, stone, boarding, labor, hauling, machinery, and fixtures, painting, and paint; Now, therefore, for and in consideration of the settlement by the said Albert Head, P. B. Olmstead, M. M. Reading, and the aforesaid others of aforesaid agreement with the said Haney & Campbell Manufacturing Company, of Belleview and Dubuque, Iowa, assignee of said obligations, the said Haney & Campbell Manufacturing Company agrees and binds itself to and with the obligators in the agreement herein referred to, to pay off and satisfy all of the claims, debts, liens, and obligations against said creamery, or which have been contracted by the said C. H. Freeman or his agents in the building and erection of said creamery, and in event of suit upon this agreement the place of payment shall be at Adaza, Iowa. Haney & Campbell Manufacturing Company, per F. J. Crawford, Secretary."

With these facts settled, what are the rights of the parties? Plaintiff, as assignee of the Freeman contract, furnished the material and performed the labor for the plant,

and it is entitled to a lien for the amount due either  
3 as a contractor or as a sub-contractor, unless it be for some of the defenses pleaded in the answer. As a sub-contractor it is entitled to a lien, for the reason that defendants do not claim to have paid anything to Freeman, and Freeman has waived all claim under the contract. No part of the work was done by Freeman under the contract. True, he did labor upon the building, but whatever he did was for and on behalf of plaintiff. So that there is no question about

the validity of an assignment of a right to a lien. The  
4 defenses relied upon have already been stated, and it may be conceded that, if this were an action against the original subscribers to the contract, the fact that some of the signatures were forged would be a defense to the others. The suit is against the association, or co-partnership, however, and

that association or co-partnership has accepted the plant, and is now operating the same. It is in no position to take advantage of the forgery of names appearing upon the contract. Had it rescinded the sale because of fraud, or had it brought action to cancel the contract and made the necessary tender, a different question might arise. We do not in this connection determine the rights of the subscribers as among themselves. It may be that some of them are not bound because of the forgeries committed by Freeman; but the association itself, which has accepted the benefits of the contract, cannot relieve itself from its burdens. *Barr v. Railroad Co.*, 125 N. Y. 263 (26 N. E. Rep. 145). This same thought applies to the claim of release because of the settlement with the Heads. Defendant adduced evidence, without objection, to show that the contract was several, and not joint. If this be true,—and we are inclined to think it is, independent of any evidence aside from the contract itself (see *Davis v. Belford*, 70 Mich. 120 (37 N. W. Rep. 919),—then the release of one did not  
5        release all. But, if it be conceded that it was joint  
and several, yet it does not follow that the defendant  
association or co-partnership is released from all  
liability on the contract. The release was simply of the  
Heads from liability under the contract, and the facts introduced in evidence clearly show that it was not intended as a technical release, but merely as a settlement of the liability of the Heads on their subscription, and a promise not to sue them. *Bonney v. Bonney*, 29 Iowa, 448; *Seymour v. Butler*, 8 Iowa, 304. Conceding that defendant's claim is correct, and that each of the subscribers is liable only to the extent of his subscription, it is clear that there was no release of the association. There is no evidence to sustain the claim that the subscription made by the Heads was collusive and fraudulent. The settlement and compromise with them did not depend upon any claim that they were to pay but one-half the amount subscribed. The burden is on defendant to establish the alleged fraud, and in this it has failed. But, if it be con-

ceded that some of the subscribers are released from liability by reason of the receipt given to the Heads, it does  
6 not follow that plaintiff's lien is thereby defeated.

The defendant, which is made up of the subscribers who have paid, has taken possession of the property by its proper officers, and is using the same. Its assets are subject to all legitimate claims against it, although some of the members of the association or co-partnership have been released. Some persons have undertaken to conduct the business, have accepted the building, and are operating the plant. Surely they cannot be heard to say that plaintiff should not recover from this association because certain of the other subscribers, who have taken no part in the management of the business, and have never become members, are not bound. Having accepted the benefits of the contract, it cannot be heard to say that it is not liable because some of the persons who subscribed for stock have been released from liability. Some question is made regarding the sufficiency of the record to justify a trial *de novo*. An examination of the transcript shows

there is no merit in the claim. Denials and counter  
7 denials in abstracts do not have the same effect under the new rules as under the old. All specific denials are now settled by a transcript which is ordered on application of the appellant. Resort to this leads to the foregoing conclusions. Plaintiff should have judgment for the sum of three hundred and thirty-nine dollars and twenty-seven cents, with six per cent. interest from May 7, 1894, and a decree establishing and foreclosing its mechanic's lien upon the property, together with the lot upon which it is situated.—  
REVERSED.

## MARY MAHONEY, JR., v. E. T. DANKWART, Appellant.

108	321
118	307
108	321
116	253

**Damages: PROXIMATE CAUSE: Pleading.** In an action for damages for permanent loss of health resulting from extreme fright caused by the negligent manner in which defendant blasted rock near plaintiff's house, it was shown that plaintiff was accustomed to blasting; that for about two weeks she had been somewhat startled and annoyed by defendant's blasting; that on the day when the  
 5 extreme fright was caused she had been warned that the blast was going to be set off, and left the house for a place of safety, her mother remaining in the house; that she was frightened about her mother, and, after the blast, returned to the house; and the house and furniture was somewhat shattered by the shock; and that her mother suddenly collapsed, and plaintiff thought she was dying. *Held*, that plaintiff's fright was not caused directly by the blast, but by her mother's condition, and that she could not recover.

**Evidence: REVIEW ON APPEAL: Jury.** In an action for personal injuries the defense was that between the 7th and 25th of a certain month the blasting of rock which caused the injury was done by an independent contractor, who had a written contract with  
 2 defendant to do the work. Several witnesses testified that the contractor had charge of the work after the 7th, while plaintiff proved that the men blasting had previously been in defendant's service, and that defendant was about the work occasionally, but it did not appear that he exercised any control over the work after the 7th. *Held*, that a verdict for plaintiff was not sustained.

**SAME.** The jury has no right to arbitrarily disregard the testimony  
 8 of an unimpeached and uncontradicted witness as to a fact which is not incredible.

**RELEVANCY.** An ordinance requiring persons blasting within the city limits to cover the orifice in which the explosive is placed, is  
 4 admissible under a petition charging that two blasts were set off in such a negligent manner as "to cause loose fragments of rock to be thrown upon plaintiff's home, to her constant fear."

**Appeal: OBJECTION BELOW.** The objection that the petition declared  
 1 upon a wilful injury, and that the court submitted the issue of negligence, cannot be raised for the first time on appeal.

*Appeal from Des Moines District Court.*—HON. JAMES D. SMYTHE, Judge.

FRIDAY, MAY 12, 1899.

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**ACTION** to recover damages for personal injuries. There was a trial to jury. Verdict and judgment for plaintiff. Defendant appeals.—*Reversed.*

*C. L. Poor and La Monte Cowles* for appellant.

*Hedge & Blythe and Charles Willner* for appellee.

**WATERMAN, J.**—Plaintiff, with her parents, occupied a dwelling which stood close to the line of a vacant lot adjoining, owned by defendant. Underlying both of these lots was a ledge of limestone, and defendant attempted to remove some of the stone from his lot by blasting. The petition states the cause of action as follows: "That defendant continued this blasting for many days during September, 1895, without warning to plaintiff or her family as each blast was fired, and with careless, wicked, and malicious disregard for the peace and safety of plaintiff, and in a reckless, negligent, and malicious way caused loose fragments of rock to be thrown upon plaintiff's home and premises, and thus put her in constant fear and frequent actual danger of her life and limb."  
\* \* \* That particularly on or about September 25, 1895, the defendant, in the course of said work above named, permitted a blast to be fired, which shook the foundation of plaintiff's dwelling, threw fragments of earth and rock upon the house and grounds of plaintiff, and cast plaintiff into extreme fright and nervous disorder of so radical a character that it has developed into permanent disease, which will inevitably shorten her life," etc. The answer is a general denial. The court submitted the case upon the theory that defendant had a right to do the blasting. It took from the jury the allegation of malice, and instructed that the charge to be considered was whether defendant was negligent. Complaint is made by appellant of the action of the court in submitting the issue of negligence. It is thought that, if defendant was not guilty of the willful wrongs complained of, he should not

be held under the petition upon the other ground. The evidence received was all of such a character as would have been admissible under a charge of negligence alone. We  
1 do not find that the point now made was presented to the trial court. At the close of the testimony, appellant's counsel moved the court to direct a verdict in his favor, based upon several grounds, but none of these covered the point we are now considering. Neither was it presented in any of the instructions asked by defendant, nor made one of the grounds for the new trial which was asked.

II. One defense interposed was that the work by which plaintiff claimed to be injured was not done by defendant, but by one Magee, an independent contractor, for whose acts defendant was in no way responsible. The trial court instructed on this theory, and it must be taken as the law of the case. *Roberts v. Abstract Co.*, 63 Iowa, 76. The jury was told that the undisputed evidence established that defendant had a written contract with Magee, by the terms of which the latter was to do the blasting; and the only matter submitted in this connection was whether the work complained of  
2 was done under this contract. The jury must have found that it was not, and in this, we think, there was error. Several witnesses testified that Magee had charge of the work after the seventh day of September, and prior to this time it is not claimed that plaintiff suffered any harm from the work. On plaintiff's part the showing is wholly circumstantial, and the circumstances are not inconsistent with defendant's claim. The men employed in the blasting operations had been previously in defendant's service. Defendant was about the work occasionally, but after the seventh of September it does not appear that he assumed or exercised any control over what was being done. This is insufficient to create a conflict of evidence. *Sullivan v. Railroad Co.*, 58 Iowa, 602. All of the circumstances upon which plaintiff relies to meet this issue may be readily reconciled with the fact that the work, after the seventh day of

September, was done by an independent contractor. See  
*Wheelan v. Railroad Co.*, 85 Iowa, 167. When a  
3 fact is not incredible, and is testified to by a witness who is unimpeached and uncontradicted, the jury has no right to arbitrarily disregard the testimony of such witnesses. *Lomer v. Meeker*, 25 N. Y. 361; *Elwood v. Telegraph Co.*, 45 N. Y. 549.

III. An ordinance of the city of Burlington was introduced in evidence over defendant's objection. It provided that any one blasting within the city limits should cover the orifice in which the explosive was placed with good, sound timber, so as to prevent fragments of rock from being thrown  
in the air; and that any failure in this regard was  
4 a misdemeanor. The objection to this evidence is that there is no claim that the damage was caused by a failure to cover the blasts, but, on the contrary, the sole ground of complaint is that the blasts were fired without warning to plaintiff. The petition charges that the blasts were set off in such a negligent manner as to cause "loose fragments of rock to be thrown upon plaintiff's home," to her constant fear. Under the issues, the ordinance appears to have been admissible.

IV. Plaintiff was not physically injured by the blasting, save as such injuries resulted from the fright she received. Counsel for appellant devote considerable attention in argument to an attempt to show that no liability exists in such a case. The trial court instructed that plaintiff could not recover for fright alone, but that she might recover if the fright resulted in physical disability. If there can be no recovery for the fright, we do not see how there can be for its consequences. *Mitchell v. Railway Co.*, 151 N. Y. App. 107 (45 N. E. Rep. 354); *Spade v. Railroad Co.*, 168 Mass. 285 (47 N. E. Rep. 88); *Trigg v. Railway Co.*, 74 Mo. 147; *Fox v. Borkey*, 126 Pa. St. 164 (17 Atl. Rep. 604). But, waiving this matter, we have read the evidence

carefully, and our conclusion is that it shows without dispute that plaintiff's fright was caused, not by the  
5        blasting, but by what she saw of its effects when she returned to the house after the explosion of September 25th. Prior to that date, the most that can be said is that plaintiff was startled at times and annoyed by the blasting. On the twenty-fifth the noise of the explosion was louder than usual. Plaintiff and her mother were in the house. They were warned of the coming explosion. Plaintiff went to a place of safety. Her mother remained in the house. Plaintiff says: "Was frightened about my mother. Thought her and the house in danger from the blast." When plaintiff returned to the house after the explosion, her mother was standing in the doorway. Shortly afterwards, the mother, as plaintiff expressed it, "collapsed." Plaintiff thought she was dying. This, with the somewhat shattered condition of the house and furniture, caused by the shock of the explosion, so wrought upon plaintiff's nervous system as to cause the physical trouble of which she complains,—an affection of the heart. We take these facts from the testimony of the plaintiff, and from the same source we gather these further facts, which strengthen us in the conclusion that plaintiff's fright was not caused directly by the blast, but rather by its effect upon her mother: Plaintiff was accustomed to blasting. Such work had been done frequently before in the immediate vicinity of her home. For many years it was carried on upon the same lot where the work was being done for defendant, and plaintiff occupied her present home during this period; and, as we have said, from the time this work for defendant was begun on the seventh of September, up to the time of the heavy explosion on the twenty-fifth, though she complains of it, she makes no claim to have been in any way injured by it. If, then, plaintiff's physical injuries were caused by her fright,—and we may say in passing there is some doubt whether the testimony shows this to be the case,—yet, as her condition was not

immediately occasioned by the blast, but was induced by her apprehension for her mother's safety, there can be no recovery. *Keyes v. Railway Co.*, 36 Minn. 290 (30 N. W. Rep. 888); *Wyman v. Leavitt*, 71 Me. 227; *Cowden v. Wright*, 24 Wend. 429; *Railroad Co. v. Kelly*, 31 Pa. St. 372; *Hyatt v. Adams*, 16 Mich. 180; *Railroad Co. v. Chance*, 57 Kan. 40 (45 Pac. Rep. 60). There does not appear to be any substantial conflict of evidence on this point. We are not unmindful of the rule announced in *Mentzer v. Telegraph Co.*, 93 Iowa, 753. Nothing here said, however, in any way conflicts with that holding. Our conclusion upon this issue is that the court erred in not sustaining defendant's motion to take the case from the jury on the fourth ground thereof, which was the want of evidence to support a verdict in plaintiff's favor.—REVERSED.

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SARAH C. MCBRIDE *et al.* v. WILLIAM MCCLINTOCK, Appellant, *et al.*

**Petition for New Trial: MOTION TO STRIKE.** A plaintiff's motion to strike a defendant's petition in equity for a new trial may be  
 2 sustained, though a co-defendant, having an interest in the litigation, similar to that of plaintiff, did not join in the motion, where co-defendant was not served with notice of the petition for a new trial.

**TREATED AS DEMURRER.** A motion to strike a petition in equity for a new trial may be treated as a demurrer. (Conceded for the sake  
 8 of the argument-Reporter.)

**NEW ISSUES.** A petition in equity for a new trial, alleging that  
 5 petitioner is entitled to land in controversy under certain deeds, will not be allowed, where petitioner's original pleading set up a claim under contracts made by letters, because such petition tenders new issues.

**RIGHTS AGAINST ONE CO-TENANT.** A defendant, in a partition suit between co-tenants, having a ground for a new trial as against  
 5 one alleged co-tenant, is not thereby entitled to a new trial as against the others.

**SECOND PETITION.** A second petition for a new trial may be stricken  
 6 from the files on motion, where it was filed without lawful rights.

**Appeal: OBJECTION BELOW.** An objection that an order sustaining a motion to strike from the files a petition for a new trial entitled as of the May term was sustained at the preceding February term  
1 is not available on appeal where the court had jurisdiction of the subject-matter of the motion and petition and the appellant appeared to the motion and did not object that it was premature as to any of the relief asked.

**SAME.** A second application for a new trial will be dismissed although no answer has been filed to it where it was filed more than one  
6 year after the decree in the original action was rendered and the  
7 moving party is not entitled to relief on any of the grounds enumerated in Code, 1878, section 8154.

**NEWLY DISCOVERED EVIDENCE.** A new trial will not be granted for alleged newly discovered evidence where it is merely cumulative  
4 and sufficient diligence to discover it before the trial is not shown.

**RULE APPLIED.** The employment of a different attorney after the trial was had, and his use of diligence in finding evidence which was not introduced at the trial, does not entitle one to a new  
4 trial, where his former attorney was lacking in diligence in procuring the evidence.

*Appeal from Plymouth District Court.*—HON. F. R. GAY-  
NOR, Judge.

FRIDAY, MAY 12, 1899.

APPLICATION for a new trial in an action in equity brought for the partition of real estate and other relief. The application was denied, and the applicant, William McClintock, appeals.—*Affirmed.*

*I. S. Struble* for appellant.

*Ira T. Martin* for appellees.

ROBINSON, C. J.—In the year 1858, William Kelley purchased of the general government a quarter section of land in Plymouth county. He was a resident of Ohio, and died in that state in the year 1864. The plaintiffs, Sarah C. McBride and Rebecca M. McBride, are his daughters, and in the year 1892 commenced this action against James M. Kelley, their brother, William McClintock, and William Bets-

worth. The petition alleged that each of the plaintiffs and the defendant James M. Kelley owned one-sixth of the quarter section, as heirs of William Kelley; that three of their brothers had conveyed their interests in it to the defendant McClintock; and that Betsworth held a mortgage on the land from McClintock for the sum of three thousand dollars. The plaintiffs asked that the share of the land to which each party to the action was entitled be determined, that the land be partitioned, and for their share of rents and profits which had accrued from it. McClintock was the only defendant who appeared in the action. He filed an answer in which he alleged that in April, 1870, the plaintiffs conveyed all their interest in the property in question to their brother George W. Kelley; that he conveyed the property to L. S. Miller and I. K. Miller; that thereafter, and in April, 1870, the Millers took possession of all the property and continued in open and notorious possession of it, under color and claim of title, for more than ten years; that in the year 1884 he purchased all of the land of the Millers, and had held actual, open, and notorious possession, under claim of absolute right and color of title, since that time; and that the claim of the plaintiffs was barred by the statute of limitations. There was a hearing on the merits, and a decree rendered in May, 1895, which adjudged that each plaintiff was the unqualified owner of an undivided one-sixth of the land in question; that the defendant James M. Kelley owned a like interest; and that McClintock owned an undivided one-half of the land, subject to his mortgage to Betsworth, and subject, further, to the amount due the plaintiffs as their portion of the rents and profits. The amount to which each plaintiff was entitled was fixed at three hundred and twenty-eight dollars and thirty-three cents. In February, 1896, McClintock filed a petition in equity for a new trial, in which he alleged that, by reason of the misconduct and wrongful acts of the attorney for the plaintiffs in preparing the decree, the court was erroneously led to adjudge that the defendant James M. Kel-

ley was the owner of an undivided one-sixth of the land; that since the trial of the cause the petitioner had discovered new and material evidence, which showed that at some time prior to the death of William Kelley, when he was old and dependent upon his children for support, he orally agreed with his son George W. Kelley that the latter should support him, give him a home until his death, and in consideration therefor have the land in question; that the agreement was performed by George W. Kelley; that after it was made the father gave to the son a written instrument in the form of a deed or contract conveying the land, but that the instrument had been lost; that after the death of William Kelley his heirs, including the plaintiffs and James M. Kelley, executed to George W. Kelley a conveyance of all their interest in the property, but that the instrument so executed had been lost. The petition also alleged that the facts averred, and the persons by whom they could be proved were unknown to him or his attorneys when the cause was tried, and asked for a new trial. There was a hearing on this petition, and in June, 1896, it was found not to be sustained, and was dismissed. An appeal from that order was taken to this court by McClintock, and in January, 1898, he asked, by motion, that the cause be remanded to the district court, with directions to the judge who had denied the petition to reopen the case, receive further evidence, and render another decision on the application for a new trial. The ground of the motion was that, since the appeal had been taken, a patent from the general government to William Kelley for one-fourth of the land in controversy, and a deed from James M. Kelley and his wife to George W. Kelley for another fourth of the land, had been found. The motion to remand was, on application of the plaintiffs, stricken from the records, and the proceedings on the first petition for a new trial are at an end. In May, 1898, McClintock filed in the district court of Plymouth county a second petition in equity for a



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new trial, in which he set out the original pleadings in the case, and the decree of the court, the first petition for a new trial, the evidence submitted on the hearing, the proceedings had, the appeal, the motion to remand, and evidence submitted in its support. The petition also alleges that the referee who had been appointed to sell and convey the land in controversy, and distribute its proceeds, was about to sell the land, and asked that he be enjoined from selling it until the further order of the court. A temporary injunction was issued as prayed. In March, 1898, the plaintiffs filed a motion to dissolve the temporary injunction, and to strike from the files the second petition for a new trial, and on the first day of April the motion was sustained, and judgment was rendered in favor of the plaintiffs for costs. From that judgment, McClintock appeals.

I. The petition stricken from the files was entitled as of the May term, 1898, of the district court, but the order sustaining the motion to strike was sustained at the preceding February term. It is insisted that the  
1 court lacked jurisdiction to do more than to dissolve the injunction at the February term. The court had jurisdiction of the subject-matter of the motion and petition, and the appellant appeared to the motion, and did not object that the motion was premature as to any of the relief asked. By what he did he fully submitted his case, so far as it was involved in the motion, to the jurisdiction of the court, and is bound by the result. It is not a case where a court has attempted to act upon a matter of which it did not have jurisdiction. The district court, by consent of parties, if that was needed, could have acted upon the motion as well at the February as at the May term, and the parties appear to have assented to a ruling on the entire motion at the time action was taken upon it.

II. It is next objected that the court erred in sustaining the motion for the reason that the defendant James M.

Kelley did not appear and join in the motion. Although he was named as a defendant in the original case, it is not shown that he was served with notice of the second petition for a new trial, nor, in fact, that he is a party to it. His interests appear to be similar to those of the plaintiffs, and no reason is disclosed for requiring that he join in the motion in question.

III. It is next contended that the effect of the motion was like that of a demurrer, and that it admitted to be true all the allegations of the petition. That may be conceded for the purpose of this appeal, but it does not follow that the motion was erroneously sustained. The question to be determined was and is, do the facts well pleaded show that the petitioner is entitled to a new trial? We do not think they do. The alleged newly-discovered evidence is merely cumulative, and diligence to discover it in time for use at the first trial is not shown. The production of the patent for one of the forty-acre tracts would not have been material to any issue in the case. Had the newly-discovered deed from James M. Kelley and wife to George W. Kelley been offered in evidence, it might have affected the appellant's recovery as to the tract which it purported to convey, but sufficient diligence to discover that deed before the first trial was had is not shown. It appears that the attorney who now represents the appellant was first employed after the trial in the original cause was had, and that diligence since that time has been shown, but those facts do not affect the rights of the appellant. He must suffer the consequences of a lack of diligence in preparing for the first trial. Misconduct on the part of an attorney in preparing the decree rendered in the original case is not shown. The petition for a new trial tenders new issues in regard to the alleged conveyances to George W. Kelley, the answer to the original petition alleging that they were made by written contracts in the form of letters

of correspondence, while the petition for a new trial alleges that they were by deeds. Moreover, when all the evidence set out in the petition for a new trial is considered, it fails to show that the original decree is erroneous, so far as it affects the rights of the parties to this appeal. The deed of James M. Kelley to George W. Kelley would only affect the rights of the appellant as against James M. Kelley, but, as already stated, it is not shown that he was a party to this proceeding in the district court, and notice of appeal was not served on him. If the appellant has any just ground to complain of James M. Kelley, that fact does not entitle him to a new trial as against the plaintiffs, for the reason that their interests are separate and distinct.

IV. It is said that, even though the injunction was properly dissolved, the petition should not have been dismissed, as the plaintiffs had not filed an answer to it, but that the cause should have been continued for hearing on  
6 the merits. The petition was filed more than one year after the decree in the original action was rendered, and the appellees contend that it was not filed within the time required by statute. The appellant insists that it was authorized by the case of *Larson v. Williams*, 100 Iowa, 110, and similar cases. A rehearing was granted in that case, which suspended the opinion filed on the first submission, and, as that was not adhered to, it had no further effect and should not have been reported. The second opinion is the only one which is in force. That refers to several cases which authorize the practice of granting new trials on applications made after the expiration of one year after the judgment or order was made, notwithstanding the restriction of section 3157 of the Code of 1873. But the fact that the jurisdiction of courts of equity in such cases was limited to the granting of relief on the grounds referred to in section 3154 of that Code was mentioned. We do not find that the

appellant was entitled to relief on any of the grounds enumerated in that section. An additional objection to the  
 7 petition under consideration is the fact that it is the second application for a new trial which the appellant has made. Whether such an application, made by the same party would be granted in any case, when its condition is the same as when the first application was denied, is a question we do not find it necessary to determine, but, if ever authorized, it would be under exceptional conditions, which do not exist in this case. We conclude that the petition under consideration did not show that the appellant was entitled to any relief as against the plaintiffs. The motion to strike appears to have been treated as a demurrer, and, if so, was properly sustained. If it was not treated as a demurrer, yet the district court may well have found that the petition was filed without lawful right, and should for that reason be stricken from the files. The order of the district court sustaining the motion to dissolve the injunction and to strike the petition, and its judgment are **AFFIRMED**.

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OSCAR THILMANY, Appellant, v. THE IOWA PAPER BAG  
 COMPANY and IOWA NATIONAL BANK, Appellees.

**National Banks: CONTRACTS OF GUARANTY: *Ultra vires*.** Under revised statute United States section 5136, authorizing national banks to exercise all powers necessary to carry on the business of banking, where a bank directs a letter to a person, stating that it will guaranty fulfillment of the obligations of another person to the former for a certain amount of goods for a certain time, and it does not appear that the second person purchased the letter or deposited any security therefor, or that the bank had any interest in the transaction, the letter, considered either as a guaranty or letter of credit, is void, and the bank is not liable thereon.

**SAME.** A national bank is not authorized to guaranty the fulfillment of the obligation of another unless such guaranty is made in connection with the transfer of a chose in action or other property belonging to the bank,

108	333
1108	358
108	333
136	88

*Appeal from Wapello District Court.*—HON. F. W. EICHELBERGER, Judge.

FRIDAY, MAY 12, 1899.

ACTION at law to recover the contract price of a car load of bag paper sold and delivered to the Iowa Paper-Bag Company, and which it is claimed the Iowa National Bank guaranteed. The paper-bag company made default and the issue was between plaintiff and the bank. The bank alleged that the guaranty was without consideration, *ultra vires*, and void. The case was tried to a jury, and at the conclusion of the evidence the trial court directed a verdict for the bank, and plaintiff appeals.—*Affirmed.*

*Seneca Cornell* for appellant.

*McNett & Tisdale* for appellee.

DEEMER, J.—Plaintiff is a manufacturer of paper, doing business at Kaukauna, Wis.; and the defendant, the Iowa Paper-Bag Company, is a manufacturer of paper bags, doing business at the city of Ottumwa, in this state. In the year 1894 the paper-bag company, desirous of purchasing paper of plaintiff, secured from the vice president of defendant bank the following guaranty: "Edwin Manning, Prest. Wm. Daggett, Vice Prest. Calvin Manning, Cashier. W. R. Daggett, Asst. Cashier. No. 1,726. Iowa National Bank. Capital Stock, \$200,000.00. Ottumwa, Iowa, December 8, 1894. Thilmany Pulp and Paper Company, Kaukauna, Wis.—Dear Sirs: The Iowa Paper-Bag Company, of this city, desire to establish business relations with you, and request us to write you. We will guaranty the fulfillment of their obligations to you, to the extent of the cost of a car load of bag paper, for the next twelve months. They are doing a good and safe business, and changed from an Ohio paper mill to your mill at our request. We hope you will give them all

advantage possible, as their competition comes from Ohio bag factories, and is sharp in this district; looking, doubtless, to driving this bag company out of the Southern Iowa market. Yours, etc., Iowa National Bank, by Wm. Daggett, V. P.” This letter was inclosed with an order for a car of paper, in a letter addressed to the plaintiff; and plaintiff thereupon shipped a car of paper to the bag company. The purchase price for this car was promptly paid, and thereafter plaintiff shipped five other cars, all of which were paid for, except the last car. This action is to recover for the last car, from the bag company on its order and from the bank on the letter of credit above set out. When plaintiff offered the letter in evidence, it was objected to by the bank on the following grounds: “Incompetent, immaterial, and because the national bank has no authority or power to guaranty the payment of commercial bills, or to bind itself by a guaranty such as [the letter referred to].” This objection was sustained, and the ruling is assigned as error.

Counsel concede that the controlling question in the case is whether or not a national bank has power to issue such a letter of credit or of guaranty as the one offered in evidence. National banks are creatures of the general government, and their powers are enumerated as follows: A national bank can “exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security; and by obtaining, issuing and circulating notes.” Revised Statutes of U. S., section 5136. This act expressly confers on such banks all incidental powers necessary to carry on the banking business. “These powers,” as said by the supreme court of the United States in *Bank v. Armstrong*, 152 U. S. 351, 38 L. Co. Ed. 470 (14 Sup. Ct. Rep. 574), “are such as are required to meet all the legiti-



mate demands of the authorized business, and to enable a bank to conduct its affairs, within the scope of its charter, safely and prudently. This necessarily implies the right of a bank to incur liabilities in the regular course of its business, as well as to become the creditor of others." The statute we have quoted does not give national banks express authority to issue letters of credit or to make instruments of guaranty. Neither does it expressly authorize the indorsement of notes or bills of exchange. But, as indorsement is often necessary to the transfer of negotiable instruments, it is clearly within the power of such banks to make this kind of contract. And so it has been held that, as a guaranty is a less onerous and stringent contract than that created by an indorsement "waiving demand and notice," such a contract is also good when made with reference to the transfer of notes in which the bank has an interest. *People's Bank v. Manufacturers' Nat. Bank*, 101 U. S. 181. When either contract has relation to a transaction in which the bank has a pecuniary interest, as where made to transfer or negotiate choses in action, or negotiable instruments which it owns or in which it has an interest, there is no longer room for doubt as to the validity of the transaction. But a guaranty of a note or bill or of an account as of a mere loan of credit to another, disconnected with any transfer of title or ownership of the paper or account guarantied, may well be doubted. Indeed, we think there is a manifest distinction between the right of a bank to guaranty choses in action belonging to it and its right to guaranty those belonging to another. It has been squarely held by the supreme court of the United States that a cashier has no power to indorse accommodation paper so as to bind the bank. *West St. Louis Sav. Bank v. Shawnee County Bank*, 95 U. S. 557. The supreme court of Michigan has also held that a cashier has no authority to accept bills of exchange for the accommodation merely of the drawers, and that there can be no recovery thereon by one having knowledge. *Farmers & M. Bank v. Troy City Bank*, 1 Doug. 457.

But, as not all contracts of guaranty or letters of credit are void, resort must be had to the instrument itself, and, it may be, to evidence *aliunde*, to determine the effect of the particular instrument in question. Letters of credit are of two kinds. When purchased by the person desiring credit, or procured by the use of checks or other securities lodged with the person who grants it, it is, in effect, a bill of exchange; and as it is based on a consideration passing directly to the bank that issues it, and has gained recognition in the commercial world, it is a valid and binding contract, and may be entered into by national banks. Daniel Negotiable Instruments, section 1794. When the letter is not purchased, but is purely an accommodation, or simply a guaranty of the payment of an account to be created in the future, it is not binding on a national bank, for such an institution has no power to thus jeopardize its capital. Such transactions are not necessary to the exercise of powers granted to national banks, and are therefore without their charter powers, and invalid. The controlling question in the case is, to which class of contracts does the one in suit belong? We are of the opinion that the letter, on its face, shows it belongs to the latter class. There is nothing on the face of the instrument to indicate that the paper-bag company purchased the letter, or that it had deposited any money or collaterals to secure the same. It is simply a promise to guaranty the fulfillment of an obligation of the bag company. True, when accepted by the plaintiff, a consideration is presumed, and need not ordinarily be alleged or proven. But this consideration may have been simply the disadvantage to the seller, or the benefit conferred upon the purchaser. There is no presumption that the paper-bag company gave anything for the letter, or that anything was withheld from it on account of the issuance thereof. The case does not differ materially from one where a member of a firm has signed the name of his partnership to a note as surety. In such case the holder cannot recover without showing that all the mem-

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bers of the firm assented. *Bank v. Law*, 127 Mass. 72; *National Park Bank v. German-American Mutual Warehousing & Security Co.*, 116 N. Y. App. 281 (22 N. E. Rep. 567); *Bank v. McDonald*, 127 Mass. 82. As the instrument in suit clearly shows on its face that it is simply a contract of guaranty, there can be no recovery without proof that it was, in effect, a bill of exchange; and it may be (a point, however, which we do not decide) that evidence to establish such fact would be inadmissible because of the form of the letter.

Again the plaintiff sues upon the instrument as a contract of guaranty; and it is well settled, as we have heretofore observed, that such contract is invalid unless made in connection with the transfer of a chose in action or other property belonging to the bank. See, as further sustaining this proposition, *Madison, W. & M. Plank-Road Co. v. Watertown & P. Plank-Road Co.*, 7 Wis. 59; *Madison & I. R. Co. v. Norwich Sav. Soc.*, 24 Ind. 457; *Norton v. Bank*, 61 N. H. 589; *Aetna Nat. Bank v. Charter Oak Life Ins. Co.*, 50 Conn. 167; *Beecher v. Dacey*, 45 Mich. 92 (7 N. W. Rep. 689). The cases referred to by appellant all involve the negotiation or transfer of negotiable instruments belonging to the bank, or in which it had an interest, and are therefore not in point. As the contract is strictly one of guaranty, the presumption is that the bank had no authority to issue it, and the trial court correctly refused to admit it in evidence.—**AFFIRMED.**

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PAUL ARMBRIGHT by CHARLES ARMBRIGHT, his next friend,  
v. WILLIAM ZION and JOHN ZION, Appellants.

**Negligence: JURY QUESTION.** Where one, standing on a platform of a windmill 50 feet high and using an iron wrench weighing four pounds, drops it to the ground, where persons might reasonably be expected to be, and a person below is injured, the dropping of the wrench is of itself an act from which negligence may be inferred, and whether he used ordinary vigilance to avoid losing

his grasp on the tool that injury might not be occasioned by its fall is a question for the jury, and where he is unable to explain how he happened to lose control of it a verdict against him will not be set aside.

*Appeal from Louisa District Court.*—HON. WILLIAM S. WITHELOW, Judge.

FRIDAY, MAY 12, 1899.

ACTION for damages. From a judgment for plaintiff, the defendants appeal.—*Affirmed.*

*W. W. Dodge* and *B. F. Van Dyke* for appellants.

*C. A. Carpenter* for appellee.

LADD, J.—The iron wrench about twelve inches long and weighing four pounds fell from the hand of John Zion on the platform of the windmill, fifty feet from the ground, where it struck Paul Ambright on the back of the head, fracturing his skull, so that a portion of it, the size of a silver dollar, was necessarily removed by the surgeon. This platform was about four by six feet, and John was up there attempting to fasten a brace to a fan with a bolt. To do so, he stood at one corner, holding himself with one hand while he reached out with the wrench to turn the burr with the other. In making a change to secure a better position, the wrench fell, but how this happened he was unable to explain. Paul was assisting his father in painting William Zion's barn. They had quit early, and, at the suggestion of William, proceeded to clean their hands for dinner. Under the mill, but within the tower, was a small milk house, where they went for that purpose. But, on the suggestion of the father that the milk might become tainted from the paint on them, Paul stepped outside, and placing the basin on the wash block, while washing his face, received the injury.

The appearance of this block indicated its use for that purpose. A similar block was at the house where they had

previously washed. Charles Armbright testified that William Zion advised him that they might make use of either as they chose, and towels were brought by the children. The evidence was such that the jury might have found that the Armbrights were at the mill when John Zion started up the ladder to the platform, and that his father, William, knew what he was about to do, and acquiesced therein. Besides, the path leading from the house to the barn, which persons were likely to use, passed near the windmill. The contention of appellants is that the evidence was not sufficient to sustain the verdict. That the facts must warrant an affirmative finding of negligence, and that the mere happening of an accident may not justify this, will be conceded. But the attending circumstances left such a finding open to the jury. The evidence tended to show that John Zion knew that the Armbrights were on the ground below the platform, and that persons were likely to be there at any time. To drop anything of considerable weight from that height above would endanger the lives of those below. Everyone is bound to exercise care commensurate with known dangers; and the dropping of a heavy iron wrench from such a height to the earth, where human being are, or might reasonably be expected to be, is of itself an act from which negligence might be inferred. See *Case v. Railway Co.*, 64 Iowa, 762. John Zion was bound to exercise ordinary vigilance that he might avoid losing his grasp on the tool he was using that injury might not be occasioned by its fall. Whether he did so was properly left for the jury to determine. *Stearns v. Spinning Co.*, 184 Pa. St. 519 (39 Atl. Rep. 292), is not in point, as there the inference of negligence from the falling of the hatchet head was rebutted. Whether John was performing the work at the instance of his father, and whether guilty of contributory negligence, were issues properly submitted to the jury. We discover no error in the record, and the judgment is **AFFIRMED.**

F. E. ZALESKY V. HOME INSURANCE COMPANY, Appellant.

108	341
514	517
108	341
120	279

**Fire Insurance:** APPRAISEMENT: *Condition precedent*. Code, section 1742, which provides that in an action on a policy of fire insurance the amount stated in the policy shall be *prima facie* evidence of the insurable value of the property at the date of the policy, but the company shall not be prevented from showing the actual value and any depreciation thereof before the loss occurred, that it shall be liable for the actual value of the property insured at the date of the loss unless such value exceeds the amount stated in the policy, and that, in order to maintain his action it shall only be necessary for the assured to prove the loss of the building insured, does not fix the value of the property destroyed, and therefor render inoperative a provision in a policy that makes an appraisal a condition precedent to a right of action on it.

108	341
139	138

*Appeal from Benton District Court.*—HON. OBED CASWELL,  
Judge.

FRIDAY, MAY 12, 1899.

ACTION on a policy of fire insurance. Judgment for plaintiff, and the defendant appealed.—*Reversed*.

*McVey & McVey* for appellant.

*W. C. Scrimgeour* and *J. J. Mosnat* for appellee.

GRANGER, J.—I. This is the second appeal of this case. See 102 Iowa, 613, for former opinion. The opinion on the former appeal presents the facts. The policy contains a provision for appraisal in case of loss. Defendant made a demand for an appraisal, under the terms of the policy, before the commencement of the suit, which was, in effect, declined by plaintiff, and it is now urged that an appraisal was a condition precedent to a right of action. Appellee urges that the provision of the policy is abrogated by chapter 211, Acts Eighteenth General Assembly, section 3 of which is

made, in effect, section 1742 of the Code. Appellant denies that such is the effect of the statute and further says that the question of the right of appraisalment, being a condition precedent to a right of action, was determined on the former appeal, and hence is the law of the case, and cannot be again considered. Appellee meets the last contention by a claim that, when the case was remanded, the pleadings were so changed that the case is not now affected by the holding on the former appeal. A reference to that case will show that we did not determine that a right of appraisalment was a condition precedent to a right of action; but that, as the district court had so held, as against plaintiff, and as he did not appeal from the ruling, it became the law of the case for that trial. It appears that, after the district court so held, it continued the case, on motion of plaintiff, to enable him to comply with the condition as to appraisalment; and thereafter the plaintiff, by a supplemental pleading, made a showing of an offer of compliance with the appraisalment provision during the continuance, which the defendant declined. A trial resulted in the court's directing a verdict for plaintiff. Our holding was that, inasmuch as the district court held an appraisalment such condition precedent, which holding, unappealed from, was the law on that trial, it was error to hold that an offer of appraisalment, after suit was brought, was a compliance with a condition. In other words, the case went from this court, with a holding that, if the right of appraisalment was a condition precedent to a right of action, the compliance with the condition must precede the commencement of the action. On the first trial, the district court held with defendant on the question of the condition being precedent, but against it on the question of a right to comply therewith after suit brought, and no assignment could well bring in question the one now before us, for it was ruled in favor of appellant.

II. The following is the part of chapter 211, Acts Eighteenth General Assembly, relied on by appellee: "In any suit or action brought in any court in this state on

any policy of insurance against the company or association issuing the policy sued upon in case of the loss of any building so insured, the amount stated in the policy shall be received as *prima facie* evidence of the insurable value of the property at the date of the policy; provided, nothing herein shall be construed to prevent the insurance company or association from showing the actual value at the date of the policy, and any depreciation in the value thereof before the loss occurred; provided, further, such insurance company or association shall be liable for the actual value of the property insured at the date of the loss, unless such value exceeds the amount stated in the policy; and in order to maintain his action on the policy it shall only be necessary for the assured to prove the loss of the building insured. \* \* \*

All the provisions of this chapter shall apply to and govern all contracts and policies of insurance contemplated in this chapter, anything in the policy or contract notwithstanding." This statute was in force at the time the policy was issued, and it is urged by appellee that it renders inoperative the provision of the policy as to appraisement, because the statute fixes the value and does just what the appraisement would have done. The measure of recovery, under the statute in question, is the actual value of the building when destroyed. The insurable value is deemed the actual value, unless the contrary is made to appear. The insurable value is fixed *prima facie* by the amount stated in the policy, and this amount is the measure of recovery upon proof of the loss of the building, with other matters, unless the company shall show the actual value to be less. *Martin v. Insurance Co.*, 85 Iowa, 643; *Des Moines Ice Co. v. Niagara Fire Ins. Co.*, 99 Iowa, 193. It is plain that the statute does not attempt to fix, as a measure of recovery, any other than the actual value of the building at the time of the loss. The law fixes the legal effect of different conditions, as that, if there is proof of the loss of the building, notice, etc., and defendant offers no proof as to the value, the measure of



recovery is the insurable value as fixed by the amount stated in the policy, because the statute makes it *prima facie* evidence of such value. But if, after such a *prima facie* showing, the company shall offer evidence to show the actual value to be less than the amount of recovery becomes a question for the jury, and the actual value is as the jury shall find it. It is clear, then, that it was not the legislative purpose to fix the amount of recovery, except under certain conditions as to proof. These observations are pertinent to our inquiry whether it was the legislative purpose, in the enactment of chapter 211, to fix an exclusive method of ascertaining damages in such cases. It goes without saying that it would be useless and futile to submit to appraisers or arbitrators the determination of what the law determined, as, if the law fixes the amount of recovery in case of total loss, that stated in the policy, appraisement, or arbitration as to amount could serve no useful purpose; and, under all authorities we have seen, the law fixing the amount would render nugatory a provision in a policy for choosing persons to do the same thing. But we have seen no case where it is held that, when the amount of recovery is a question of fact, the parties may not stipulate for its ascertainment by appraisers as a condition precedent to a right of action. We are referred by appellee to several cases supporting his contention, and we refer to them. Each case is determined under a statute radically different from ours in this: that in none of them is the question of amount of recovery left for ascertainment as a question of fact. It is fixed in each case as the amount stated in the policy. *Insurance Co. v. Eddy*, 36 Neb. 461 (54 N. W. Rep. 856), is one of the cases, and the controlling language of the act (Acts 1899, p. 425) is in these words: "The amount of insurance written in such policy shall be taken conclusively to be the true value of the property insured, and the true amount of loss and measure of damage." In Ohio the law is that, "in case of total loss, the whole amount mentioned in the policy, or renewal, upon which

the insurers receive a premium, shall be paid." *Insurance Co. v. Leslie*, 47 Ohio St., 409 (24 N. E. Rep. 1072). In Wisconsin the law provides that "the amount of insurance written in the policy shall be taken and deemed the true value of the property at the time of such loss \* \* \* and such amount shall be taken and deemed the measure of damages." *Reilly v. Insurance Co.*, 43 Wis. 449. In Missouri the law provides that "the amount of insurance written in such policy shall be taken conclusively to be the true value of the property when issued and the true loss and measure of damages when destroyed." *Havens v. Insurance Co.*, 23 Mo. 403 (27 S. W. Rep. 718). If there is anywhere an authority that a statute substantially like ours operates to nullify a stipulation for appraisement in a policy, it has not come to our notice, and reason does not lead to such a conclusion. The ground upon which such statutory provisions are held to nullify a policy provision for appraisement is that the law fixes the amount of damages recoverable, and there are no questions to be settled by appraisement. Appellee's contention is based on precisely such a claim. But our statute, as we have seen, does not fix the amount.

Our present Code embodies the provisions of chapter 211, being section 1742, in substantially the same language as the original act, and the next section, 1743, contains this language: "No recovery on a policy or contract of insurance shall be defeated for a failure of the insured to comply, after loss occurs, with any arbitration or appraisement stipulations as to fixing the value of the property, unless it be pleaded and proved that the insurance company gave notice," etc. This provision was not in the law prior to October 1, 1897. Appellee regards this added feature of the law as evidence that appraisement was, not before, necessary. The question of its necessity is not involved. The question is, was it then a right? Of course this change or added provision is only important so far as it indicates the legislative thought as to the prior law and the change intended. If the legislative

thought was that section 1742 would deny the right of appraisal, without a saving clause for that purpose, and the purpose was to save that right, it would naturally use language adapted to such a purpose. If, on the contrary, it thought the right existed, but desired to limit or regulate its operation, it would naturally use different language. There is not a word used to indicate a purpose to grant or save a right, but every word is for the purpose of prescribing and limiting the exercise of an existing right. The only way to sustain the claim of appellee is to hold that the law makes the policy conclusive evidence of the amount of recovery, and such is the tenor of his argument. It will not bear that construction. Our conclusion is that there was a right of appraisal as a condition precedent to a right of action. The judgment must be REVERSED.

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In the Matter of the Assignment of THE A. C. MOUNT  
BROOM COMPANY. Claim of ALBERT GREEFE and  
Objections Thereto.

**Assignments: PURCHASE OF ASSIGNEE'S EQUITY:** *Building and loan associations.* A purchaser at an assignee's sale of the assignor's equities in land, which, prior to the sale, had been conveyed to the purchaser for the benefit of the assignor, and upon which the purchaser had secured a loan from a building and loan association, subscribing for stock of the association in his own name and pledging the same as collateral security, is entitled as against the assignor and assignee, to the benefit of payments made by them upon the stock.

**SAME.** Claimant, being the owner of certain premises, borrowed money from a building association for a third person, and gave a mortgage on the premises to secure the same. At the same time claimant purchased in his name shares of stock in the association, which were also pledged as additional security, and the third person agreed to pay the monthly installments thereon. The payment of the installments would mature the stock at the time the mortgage became due, and would pay it. In consideration of the agreement to pay the mortgage to the loan company, and another one on the same premises to another, the claimant agreed to deed

a part of the premises to such third person. After the assignment of the latter for benefit of creditors, but before all the installments were paid claimant purchased the equity of the insolvent in said premises under an order of court, and paid the mortgage, and new certificates of stock issued to him. *Held*, that claimant is under no obligation to the insolvent's estate to account for the installments paid by insolvent on said stock.

*Appeal from Polk District Court*—HON. T. F. STEVENSON,  
Judge.

SATURDAY, MAY 13, 1899.

THE A. C. Mount Broom Company is a corporation, and made an assignment for the benefit of creditors about October 5, 1895, with G. B. Stewart as assignee. Prior thereto it was indebted to Albert Grefe in the sum of one thousand nine hundred and sixty-four dollars and twenty-three cents, secured by mortgage on personal property. Grefe filed his claim with the assignee, and asked its allowance as a preferred claim, because secured by mortgage. W. L. Roseboom & Co. and J. P. Gross & Co. are also creditors of the corporation, with claims filed and allowed. On the coming in of a report by the assignee, in which these claims are reported and their approval asked, W. L. Roseboom & Co. and J. P. Gross & Co. objected to the approval of the claim of Albert Grefe, as a preferred claim or otherwise, and the grounds of their objection appear from the following facts: A. C. Mount and Albert Grefe were stockholders in the corporation, the latter being its president. Mount was the owner of the west eighty-four feet of lots 7 and 8, in block C, of Griffith's addition to Des Moines. The corporation, which we will call the "Broom Company," desired the west forty feet of the part owned by Mount, and, by an agreement of Mount, Grefe, and the Broom Company, the entire eighty-four feet was conveyed to Grefe and his wife, by Mount, with an incumbrance thereon of one thousand two hundred dollars. In pursuance of the agreement, Grefe and wife borrowed from the Polk County Loan & Building Association eight

thousand dollars, under the conditions and regulations prescribed by the association, which amount was for the Broom Company, and was paid to it. To secure this loan, Grefe and wife made to the association their note and a first mortgage on the eighty-four feet of the lots, and also became members of the association, each taking twenty shares of stock therein, of the par value of two hundred dollars each, so that the amount of stock taken by both was equal to the loan. These certificates of stock were also assigned to the association as additional security for the loan. The membership in the association, and the taking of stock therein, was a part of the plan for obtaining the loan, and agreed to by all the parties. This membership, under the laws of the association, required monthly payments by the stockholders, and these payments, if made as required, would at the maturity of the eight thousand dollar note, be equal to, and effect a payment of, it. As between Grefe and wife and the Broom Company, the latter was to make these payments and discharge this debt. Albert Grefe also made to Mount his note for two thousand eight hundred dollars, payable August 26, 1900, which was secured by a mortgage on the eight-four feet, subject to the other mortgage. This debt was also to be paid by the Broom Company. Grefe and wife gave the Broom Company its written obligations, when the Broom Company should pay the association loan and the special assessments and taxes on the lots, to make it a deed for the west forty feet of the lots; and also, when it should pay the two thousand eight hundred dollar note to Mount, as well as the association loan, to make Mount a deed for the east forty-four feet of the eighty-four feet of the lots. In pursuance of these agreements, the Broom Company made payments to the association to the last of September, 1895, so that the amount thereof and the accumulations amounted to one thousand seven hundred and thirty-eight dollars and eighty cents, and, as we have said, made an assignment the first part of October, and such payments ceased. The assignee there-

after applied to the court for an order to pay to Grefe, for the use of the property, a rental of one hundred and fifteen dollars per month, which order was granted, and such rental was paid for six months, amounting to six hundred and ninety dollars, and Grefe paid the dues on the stock, amounting to seven hundred and seven dollars and twenty cents. On the eighteenth day of January, 1896, the assignee obtained an order to sell, at public sale, on due notice, the equities of the Broom Company in the west forty feet of the lots, and the same was so sold to Grefe, and the sale approved. April 11, 1896, Grefe paid off the association loan, and new certificates issued for the stock to him and to others. The creditors, who appear to object to the allowance of the claim of Grefe, think he has no right, because of his purchase of the interest of the Broom Company in the lots, to take the stock and not account for the money paid by the Broom Company thereon. The district court overruled the exceptions and objections to the report of the assignee, and the objectors appealed.—*Affirmed.*

*Ayers, Woodin & Ayers* for appellants.

*Dudley, Coffin & Byers* for appellee.

GRANGER, J.—I. Appellants submit as a basis for argument a question as follows: "Did the sale of the interest of the A. C. Mount Broom Company in the real estate, by the assignee, also convey the interest of the A. C. Broom Company in the Loan & Building Association stock?" Appellants then say: "Our contention is that the stock held by the Grefes, and the bond and mortgage executed by them to the Loan & Building Association, were two separate and distinct contracts, and that they stood in the double relation to the association as stockholders and borrowers." As the case must turn largely, if not entirely, on what rights passed to Grefe by his purchase of the rights or equities in the land, it may be well to first determine such rights or equities, and such a

determination will necessarily have to do with the correctness of appellants' contention. The Broom Company had no rights in the land, except such as grew out of the contracts by which it sought to become the owner. Because of its irresponsibility, it could not become, directly, the purchaser. Hence the indirect method was adopted of having Grefe and wife take the title, and assume an obligation to convey to the Broom Company on its making certain payments. It was not intended that Grefe and wife should, upon full performance, have any interest in the lots. The carrying out of the contract would put the title to the west forty feet in the Broom Company, and that of the east forty-four feet back to Mount. The taking of the stock was a part of the plan adopted by all as a means of obtaining the loan, and the loan was to be paid, and the incumbrance on the land discharged, by the Broom Company making the payments to mature their stock; and here we state a fact, as we understand it, that is quite important. It was not the intention, at the outset, to discharge the loan and have the stock remaining,—that is, had the Broom Company continued its payments, as agreed upon till the loan note matured, the debt would have been paid and the stock canceled; the taking of the stock being merely incidental to the loan, in the way of additional security and the manner of making the payments. These payments were, in effect, payments on the land under the agreement with Grefe, and, when fully paid, gave the Broom Company a right to the title. The rights or equities of the Broom Company consisted of the right to complete this contract and take the title, with the incidental right of possession. This right it sold under the order of the court, and Grefe had the right to go forward and complete the payments, as the Broom Company could have done, and own the land. Now, let us assume that he did so, and see what, under its contract, the Broom Company could claim for its payments made. No one will for a moment doubt that Grefe could, after his purchase under the order of court,

commence where the company left off, and, by completing the payments, own the land, and the Broom Company would have no claim for its payments; for its equities included the payments, and these were sold. The thought may be clearer if we dismiss for a moment the trivial sum paid, and assume that Grefe paid for the equities the full amount of what the Broom Company had paid. All would then agree that Grefe would not be responsible for anything to the Broom Company. The solution of that difficulty is in this: that Grefe's rights do not depend on what he paid, but upon what he purchased. There is no claim of fraud or unfair dealings. Being a valid sale, Grefe took the same rights whether the amount paid was much or little, and the Broom Company parted with the same rights. Had Grefe gone forward and matured the stock, by making the payments, and thus paid the debt, the stock would have been canceled, and the land been his. In doing this, he would have had the advantage of what the Broom Company had paid. Instead of so doing, he paid the mortgage debt, and then continued payments on the stock, taking new certificates, with a view, as we understand, to complete the payments and own the stock. If the loan association would permit this, we do not see how the Broom Company or its creditors can complain; for its assets, or rights, are in no way affected by it. This case is determined largely upon the contract between the Broom Company and Grefe,—in fact, almost entirely so,—because of which many authorities cited are not in point. The association is not a party here, and its obligations to its members are not brought in question. The authorities cited bear upon controversies with such associations and members and others. It may be true that a member of such an association who is a borrower occupies something of a dual relation, as stockholder and borrower. The claim has the support of reason and authority, but that in no way changes the conclusion we reach; for the facts are as we present them, and such a relationship does not in this case interfere with



the contract with the Broom Company, which is controlling. The judgment will stand **AFFIRMED**.

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**DETLEF F. KRUSE V. THE SEIFFERT & WEISE LUMBER COMPANY, Appellant.**

**Corporations: PRINCIPAL AND AGENT.** A corporation which desires to avoid liability for services rendered in connection with its business by reason of an arrangement between itself and an agent, whereby the latter is to do all the work and pay the necessary help from money furnished by it, must inform the person who renders the services, of the arrangement before the services are rendered.

**SAME.** The payment by the master to the agent of the money for the servant's wages will not relieve him from liability to the servant, where the agent does not make the payment.

**RULE APPLIED: Jury question.** A company carried on business through a general agent, allowing him a specific sum monthly for the payment of help, for whose wages he alone was to be responsible. A person employed by the agent in the business, repeatedly stated that he was working for the agent, and, when the latter

1 was discovered to be a defaulter, said he had lost all his wages. In an account of the wages due him, he charged them to the agent, and, after the latter's defalcation, took his note for the amount.

6 Letters written by him to the agent indicated that he looked to him alone for pay. Not being dependent on his wages, he paid little attention to collecting them, and testified that, in taking the agent's note, he did not intend to discharge the company. *Held* that a finding that the services had been performed for the company, and not for its agent individually, was warranted.

**EVIDENCE.** That the memoranda of accounts made by plaintiff in an action against a corporation for services rendered in connection with its business did not show an account with it, but with its

3 agent, whom it claims had undertaken to carry on the business and to pay for all services, is but *prima facie* evidence that the plaintiff relied on the agent's responsibility, and is subject to explanation.

**SAME.** The taking of the individual note of the representative of a corporation in settlement for services rendered in the business of

2 the corporation, is not conclusive evidence that it was accepted in payment of the claim or that the person rendering the services did not have a claim against the corporation therefor.

108	352
132	342

108	352
137	429

108	352
138	162

108	352
144	714

INTENT. When it is material to determine the motive or intention with which an act was done, the testimony of the person doing it  
4 as to his motive and intention, is competent evidence.

RULE APPLIED. On an issue whether a note taken by an employe from the agent of the master for wages due him was taken in  
4 payment, the employe may testify as to the intent with which he took the note.

LEADING QUESTIONS: *Discretion.* The trial court has considerable  
5 discretion in allowing leading questions on direct examination, especially where the witness does not readily understand the English language.

*Appeal from Pottawattamie District Court.*—HON. N. W. MACY, Judge.

SATURDAY, MAY 13, 1899.

ACTION at law to recover for services rendered. There was a trial by jury, and verdict and judgment for the plaintiff. The defendant appeals.—*Affirmed.*

*Benjamin & Preston* for appellant.

*John P. Organ, A. W. Askwith, and Robertson & Kimball* for appellee.

ROBINSON, C. J.—For several years prior to February, 1889, the firm of Seiffert & Weise carried on in Minden, Iowa, the business of dealing in lumber and other merchandise. The chief place of business of the firm was at Avoca. In February, 1889, the firm was succeeded by the defendant, a corporation, which thereafter carried on business at Minden as the firm had done before. The business at that place was in charge of Charles Altmansperger, who represented the firm, and afterwards the corporation, as agent. In January, 1896, he was found to have been guilty of criminal mismanagement of the business; was arrested, convicted, sentenced to the penitentiary at Ft. Madison, and his agency terminated. The plaintiff worked in the yard at Minden while it was carried on by the firm, and also by the defend-

ant, and claims that both are indebted to him for services rendered, and the defendant assumed, and is liable for the payment of, the debt, owed by the firm. That is denied by the defendant, and the issue in regard to it was withdrawn from the jury. The transactions between the plaintiff and the firm are important, for the purposes of this appeal, only so far as they tend to show the actual relations which existed between the plaintiff, the defendant, and Altmansperger.

I. It is contended by the defendant that it never employed the plaintiff, and is not responsible for the amount due him, but that he was employed by, and worked for, Altmansperger alone. There is much in the record which  
1 tends to support that claim. Numerous witnesses testified that at different times the plaintiff stated that he was working for Altmansperger, or "Charlie," as he was called, and looked to him for compensation, and that, when he was found to be a defaulter, the plaintiff stated that he had lost what was due him for services. Letters written by him to Altmansperger while the latter was in the penitentiary tend to show that he was regarded by the plaintiff as the one responsible for the claim in suit, and memoranda of the accounts made by the plaintiff tend to show the same. In a settlement made in May, 1892, between Altmansperger and the plaintiff, the latter accepted the personal note of the former for one thousand dollars, the balance then found to be due. The members of the firm and Altmansperger testify, in effect, that the latter was allowed a specified sum monthly with which to pay for necessary help in the business, and that he alone was responsible for the wages of the plaintiff. The evidence would certainly have authorized the jury to find that such was the case. But much of the evidence relied upon by the defendant is susceptible of an explanation in harmony with the theory of the plaintiff. It is clear that his contract of employment was somewhat indefinite. In fact, he states that there was no express agreement, but that he went to work without so much as a definite understanding

respecting the wages he was to receive. No time for payment was fixed. The relations between the plaintiff and his employer were of the most informal character. The plaintiff, it appears, did not depend upon his wages for a living, and gave the matter of collecting them but little attention. Since Altmansperger was the one who had immediate charge of the business, and with whom the plaintiff associated and dealt, it was natural for him to speak of Altmansperger, or "Charlie," as his employer,—as the one for whom he worked, without intending to convey the idea that he was not working for the firm or for the defendant. The

2        taking of the note in settlement was not conclusive evidence that he accepted it in payment of his claim, nor that he did not have a claim against the defendant. He had great confidence in Altmansperger, and relied upon him to make a proper settlement; but he states that he did not intend to discharge the defendant from liability by making the settlement with Altmansperger and taking his note. It was said in *Bank v. Gifford*, 79 Iowa, 300, that "the giving and accepting of a promissory note for a prior debt, would

3        not be regarded as payment thereof, unless there be an agreement of the parties to that effect." The fact that the memoranda of accounts made by the plaintiff did not show an account with the defendant, but with its agent, was but *prima facie* evidence, subject to explanation. *Guest v. Opera-House Co.*, 74 Iowa, 457; *Foster v. Persch*, 68 N. Y. 400. The plaintiff denies many of the statements attributed to him, and the conflict in the evidence was such that the verdict of the jury must be regarded as conclusive as to the facts.

II. The defendant complains of the rulings of the court which permitted the plaintiff to testify respecting his intent and purpose in certain transactions,—as that he did not accept the note in payment of his claim against the

4        defendant. We think the rulings were correct. It was said in *Browne v. Hickie*, 68 Iowa, 330, that,

"when it is material to determine the motive or intention with which an act was done, the testimony of the one doing the act, as to his motive or intention, is competent evidence." See, also, *Frost v. Rosecrans*, 66 Iowa, 405.

III. The appellant complains of certain questions asked of the plaintiff, on the ground that they were leading. The plaintiff did not readily understand the English language, and it appeared to be necessary to make the  
5 questions he was required to answer simple and easily understood. The trial court has considerable discretion in allowing leading questions. *Hall v. Bank*, 55 Iowa, 612; *State v. Moelchen*, 53 Iowa, 310; *State v. Bodekee*, 34 Iowa, 520. We do not think that an abuse of that discretion is shown.

IV. The appellant complains of the refusal of the court to give instructions asked, and criticises portions of the charge given. The charge incorporated so much of the instructions refused as was correct, and fully and fairly submitted the case to the jury. We do not find in it, or in numerous rulings of which the appellant complains, any ground for reversing the judgment of the district court. It is said the amount of the recovery was excessive, but we think it was authorized by the evidence. It is claimed that the evidence does not sustain the verdict, but we do not think that is correct. The relation between the defendant and Altmansperger is admitted to have been that of principal and agent, and the amount which the plaintiff recovered is shown to be due him for services rendered in the defendant's yard at Minden; and  
it must be presumed, until the contrary is shown, that  
6 the defendant is liable for the amount. The defendant claims, and submitted evidence to show, that, by an arrangement between itself and Altmansperger, the latter was required to do all the work at Minden, and pay the necessary help from money furnished him by defendant; but whether the plaintiff knew of that arrangement was a question for the jury. It was the duty of the defendant, if it is desired to

avoid liability on account of the services in question, to inform the plaintiff of the arrangement before the services were rendered. *McCrory v. Ruddick*, 33 Iowa, 521; *Shelton v. Johnson*, 40 Iowa, 84. The jury was authorized to find that the plaintiff did not know of the arrangement, and, if he did not, he was not affected by it, even though the defendant paid the money required by the arrangement to Altman-sperger in good faith, in the belief that it was not liable to the plaintiff. Although the jury might well have found for the defendant on the evidence submitted, yet its finding for the plaintiff has so much support in the evidence that we cannot disturb it.

What we have said disposes of the controlling questions in the case. We have examined all the objections made, but do not find any prejudicial error. The judgment of the district court is therefore **AFFIRMED**.

108	357
110	279
108	357
1125	42
125	44

**OSCAR THILMANY, Appellant, v. THE IOWA PAPER BAG COMPANY and WILLIAM DAGGETT.**

**Contracts: CONSTRUCTION: *Principal or agent.*** A contract signed, "Iowa National Bank, by William Daggett," is the contract of the  
 3 bank, and not of the party making the signature; and this construction is not affected by the use of the pronouns "we" and "our" in the contract.

**LIABILITY OF AGENT.** Since there is no implied warranty by an agent that his principal has authority to contract, an officer or agent of a national bank, acting within the scope of his authority, cannot be held personally liable upon a contract of guaranty made on  
 8 behalf of the bank, but which is in excess of the power of the bank to make.

**Evidence: CONSTRUCTION OF GUARANTY: *Admissibility.*** Letters written by a guarantee to his guarantor subsequent to the making of the contract of guaranty, and containing self-serving declarations, are not admissible in evidence, in action upon the guaranty,  
 1 as an aid to the proper construction of the contract, where such declarations are irrelevant to any issue in the case, and the contract is clear and unambiguous.

HARMLESS EXCLUSION. Error in excluding from the evidence a letter  
1 containing a contract of guaranty is without prejudice, where the  
writing of the letter is admitted by the guarantor.

*Appeal from Wapello District Court.*—HON. FRANK W.  
EICHELBERGER, Judge.

SATURDAY, MAY 13, 1899.

ACTION to recover the purchase price of a car load of paper shipped to the Iowa Paper-Bag Company. Defendant Daggett was originally joined in the action brought by the plaintiff against the paper-bag company and the Iowa National Bank, decided at the present term of this court. 108 Iowa, 333. His demurrer to the petition in that case was sustained, and plaintiff thereupon filed a separate petition against Daggett, in which he charged him (Daggett) with personal liability for the purchase price of the paper, because of having signed the letter of guaranty referred to in the case against the bag company and the bank. A number of defenses were pleaded by defendant, some of which will be noticed in the body of the opinion. The case was tried to the court, a jury being waived, resulting in a judgment dismissing the plaintiff's petition, and he appeals.—*Affirmed.*

*Senaca Cornell* for appellant.

*McNett & Tisdale* for appellees.

DEEMER, J.—Plaintiff claims that defendant Daggett is liable on the written guaranty for two reasons: *First*, because it is his individual contract, was intended to bind him as well as the bank, and was so received and acted upon by appellant; *second*, for the reason that, if he intended said guaranty or letter of credit to be the obligation of the bank only, he was acting beyond the scope of his authority as vice president of the bank, and failing to bind the bank, is him-

self liable; as an agent who attempts to bind his principal by a contract he had no authority as such agent to make.

Plaintiff also contends that the court erred in sustaining objections to certain letters written by him to defendant Daggett as vice president of the Iowa National Bank, on the theory that these letters were essential to a proper construction of the guaranty in suit. We think the objections were

properly sustained. The letters were written long  
1 after the letter of guaranty was sent to plaintiff, and,  
as it is clear and unambiguous in its terms, they were  
simply self-serving declarations, irrelevant to any issue in the  
case. The letter of guaranty was also offered in evidence by  
plaintiff, but objection thereto was sustained. As defend-  
ant Daggett admitted the writing of the letter, the ruling  
denying its admission was without prejudice.

We now turn to the main points in the case, and first  
to the proposition that defendant Daggett is liable because of  
the form of the guaranty. It is signed, "Iowa National Bank,  
by William Daggett, V. P." Clearly, this is an  
2 obligation of the company; and the form of the signa-  
ture just as clearly indicates that Daggett signed it in  
a representative capacity, and not as an individual. To hold  
that the contract binds Daggett personally, we must eliminate  
the preposition "by," and hold that the initials "V. P." are  
"*descriptio personae*." This we cannot do, as it is not our  
province to make contracts for parties. The use of the pro-  
nouns "we" and "our" in the letter of guaranty is of no sig-  
nificance. They are often used in referring to a corporation  
as a collection of individuals. There is no question in our  
minds but that all parties to this contract regarded it as  
the obligation of the bank, and not of the defendant Daggett  
in his individual capacity; and, as this is the proper legal con-  
struction of the instrument, nothing further need be said on  
the first proposition urged by appellant's counsel.

II. As to the second proposition, the rule has been  
broadly stated over and over again that when an agent con-



tracts in excess of his authority, or acts without authority, or assumes to have authority when he has none, or for any reason fails to bind his principal, he is himself bound. *Winter v. Hite*, 3 Iowa, 142; *Allen v. Pegram*, 16 Iowa, 163; *Andrews v. Tedford*, 37 Iowa, 314; *Lewis v. Tilton*, 64 Iowa, 220. That this is the general rule must be conceded, and, as applied to the facts of the cited cases, it is correct. But, like nearly every other general rule, it is subject to exceptions, some of which we will notice. The reasons generally given for the rule are: *First*. That, as the agent assumes to represent a principal, he cannot be heard to say that he had no authority, or that there was in fact no principal to be bound; for, if he assumes to represent another, he impliedly warrants that there is such another, and that he has authority to represent him. If, then, there is no principal, or the agent has no authority to act for him, an action will lie for deceit or misrepresentation. *Second*. The law assumes that the contract was intended to bind some one, and, if the principal is not bound, the contract must be that of the agent. This last rule is generally applied to executed contracts. In such cases action will lie for benefits received by the agent. Some cases go to the extent of rejecting all parts of the contract relating to the obligation of the principal, and then treat it as the personal contract of the agent. As illustrating this rule, see *Byars v. Doors*, 20 Mo. 284; *Woodes v. Dennett*, 9 N. H. 55; *Terwilliger v. Murphy*, 104 Ind. 32 (3 N. E. Rep. 404). A third reason for the rule is that the agent impliedly warrants his authority to act for his principal, and, if he has no such power, an action lies for breach of warranty. Now, it is apparent that if the party with whom the agent contracts has notice of the facts relating to the authority of the agent, and is as fully advised as to his authority as the agent himself, there can be no action for deceit. And so the text writers have generally stated this as an exception to the general rule. Mechem on Agency, at sections 545 and 546, thus states the law: "Sec. 545. \* \* \* Of course,

if the other party knew, or by the exercise of reasonable care might have discovered, the want of authority, he cannot recover. This implied warranty by the agent of his authority must ordinarily be limited to its existence as a matter of fact, and not be held to include a warranty of its adequacy or sufficiency in point of law. "Sec. 546. Where Agent Discloses All the Facts Relating to His Authority. Where, however, the agent, acting in good faith, fully discloses to the other party at the time all the facts and circumstances touching the authority under which he assumes to act, so that the other party, from such information or otherwise, is fully informed as to the existence and extent of his authority, he cannot be held liable. It is material, in these cases, that the party claiming a want of authority in the agent should be ignorant of the truth touching the agency. If he has full knowledge of the facts, or of such facts as are sufficient to put him upon inquiry, and he fails to avail himself of such knowledge, or of the means of knowledge reasonably accessible to him, he cannot say that he was misled, simply on the ground that the other assumed to act as agent without authority. Of course, if the agent conceals or misrepresents material facts, to the detriment of the other party, he cannot claim exemption." Judge Story, in his valuable work on Agency (section 265) says: "This doctrine, however, as to the liability of the agent, where he contracts in the name and for the benefit of the principal, without having due authority, is founded upon the supposition that the want of authority is unknown to the other party, or, if known, that the agent undertakes to guaranty a ratification of the act by the principal. But circumstances may arise in which the agent would not or might not be held to be personally liable, if he acted without authority, if that want of authority was known to both parties or unknown to both parties." Abundant authorities are cited by each author in support of these propositions. The same thought is equally applicable to the third reason above given for the general rule. And it may be further said that the implied warranty of the agent does not relate to the power of

the principal to enter into the particular contract. He simply covenants that he has authority to act for his principal, not that the act of the principal is legal and binding. Hence it has been justly said that the contract must be one which the law would enforce against the principal, if it had been authorized by him, else the anomaly would exist of giving a right of action against an assumed agent for an unauthorized representation of his power to make the contract, when a breach of the contract itself, if it had been authorized, would have furnished no ground of action against the principal. *Abeles v. Cochran*, 22 Kan. 406; *Baltzen v. Nicolay*, 53 N. Y. 467; Mechem Agency, section 548; *Snow v. Hix*, 54 Vt. 478. In the case now under consideration the defendant Daggett made no representations as to his authority, save that contained in the letter itself. He is guilty of no actionable deceit, unless it be found in the fact that he signed the letter of guaranty as vice president, and thus represented that he had authority to represent his bank. He had this authority, if any officer of a national bank has it, for no question is made as to his authority to represent the bank in the making of any contract it is authorized to execute. The action is not, then, based upon any misrepresentation as to his authority, but upon the invalidity of the contract itself as between plaintiff and the bank. There was no actionable deceit, for the plaintiff is presumed to know as much about the powers of national banks as the defendant. There is, as we have said, no implied warranty by an agent that his principal has authority to make the contract. As a rule, that is a question of law, of which each party has equal knowledge. In the case against the bank we held that national banks have no authority to enter into such contracts, and as the plaintiff has no right of action against the bank upon a contract of guaranty, such as the one in suit, no recovery should be permitted against the agent; for this would hold every agent to a warranty of legality of his principal's contracts. As we have seen, this is not the obligation of the agent. The second reason sometimes given for the

general rule of liability of the agent does not appear to us to be sound. By the application of this principle a new contract is made for the parties. An engagement is created which the parties did not intend to assume, and the decided weight of authority is against such rule. See *Hall v. Crandall*, 29 Cal. 568; *Ogden v. Raymond*, 22 Conn. 379; *Duncan v. Niles*, 32 Ill. 532; *Stetson v. Patten*, 2 Me. 358; *Abbey v. Chase*, 6 Cush. 56; *White v. Madison*, 26 N. Y. 117; *McCurdy v. Rogers*, 21 Wis. 199. We should be slow to adopt any rule which would bind a party who did not by the terms of his contract agree to become responsible. Indeed, the question seems to be put at rest, so far as this court is concerned, in *Willett v. Young*, 82 Iowa, 292. The rules herein announced are not in conflict with any of the previous decisions of this court. The case of *Winter v. Hite*, *supra*, related to the contract of an executrix, and it is there said that such cases should not be confounded with those of agency. In the case of *Andrews v. Tedford*, *supra*, the question was left undecided. *Allen v. Pegram* was an action against an agent who assumed to act for a principal that had no existence; and so was *Lewis v. Tilton*, 64 Iowa, 220. These cases come clearly within the general rule first announced. In other cases cited by appellant's counsel the agent was held liable because of the form of his signature. They have no application to the question before us. We do not think that Daggett, the agent is personally liable, under the facts disclosed, and the judgment is **AFFIRMED**.

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HENRY SMITH *et al.* v. J. S. McQUISTON, Auditor, Appellant,  
and HENRY SMITH *et al.* v. JAMES A. BREWER *et al.*,  
Appellants.

108	368
112	121
108	363
138	368

**Assessment:** ERRONEOUS ENTRY; *Remedies.* Where an excessive assessment was entered on the rolls through a clerical error in copying, and without the assessor's knowledge, the tax payer is  
1 not precluded from questioning the amount thereof because he

did not go before the board of equalization for relief before beginning mandamus to compel the county auditor to correct the same, or before paying the tax under protest, and beginning an action to recover the taxes paid in excess of the true assessment.

SAME. The power conferred upon the county auditor by Code of 1873, to correct any clerical or other error in the assessment or tax book, includes the power to determine when a mistake has  
 1 been made, and the word "mistake" covers all cases where the record does not disclose the true facts and the word "error" includes a mistake in copying an assessment into the assessment roll, in consequence of which it is larger than the actual valuation fixed by the assessor. *Polk County v. Sherman*, 99 Iowa, 60 distinguished and limited.

Appeal: OBJECTION BELOW. An objection that no claim was ever presented to the board of supervisors, cannot be raised for the  
 2 first time on appeal, in an action to recover for taxes paid on an assessment which, through a mistake in copying the same, was larger than the valuation actually fixed by the assessor.

SAME. An objection, in an action on an assigned cause of action,  
 3 that the assignment was not shown, cannot be raised for the first time on appeal

*Appeal from Polk District Court.*—HON. W. A. SPURRIER,  
 Judge.

SATURDAY, MAY 13, 1899.

THESE actions grow out of the same transaction, and the questions involved may very properly be considered together. The first is a proceeding by mandamus to compel the defendant, who is the county auditor of Polk county, to correct an assessment of plaintiffs' property. The other is to recover taxes paid under protest, and which were levied upon the assessment complained of. There was a trial to court, and a judgment for plaintiffs, in each of the actions. Defendants appeal.—*Affirmed.*

*W. G. Harvison and Thomas A. Cheshire* for appellants.

*C. A. Bishop and D. F. Callender* for appellees.

WATERMAN, J.—The undisputed facts are that the assessor fixed upon plaintiffs' real estate a valuation of three

hundred and ten dollars, but, by some error in copying the same, this assessment now appears upon the roll as three thousand one hundred and fifty dollars. We are also authorized to find from the evidence that at the time the assessment was made the assessor gave to the owner of the land, one Callender, a written statement that the assessed valuation of the property was three hundred and ten dollars. The owner took no steps to have the so-called assessment reduced until he brought the first of these actions. Thereafter, a tax having been levied upon this assessment, plaintiff paid it under protest, and the second action was brought for the recovery of the amount so paid.

II. Is plaintiff precluded from questioning now in any manner the amount of this assessment, and, if not, has he adopted proper proceedings therefor? Appellant thinks both of these propositions are determined against the plaintiff in the case of *Polk County v. Sherman*, 99 Iowa, 60. While some language is used in that case which seems to lend support to the claim, we do not think, when all the facts are considered, that it is controlling as to the case at bar. In that case the district court, on petition of the aggrieved tax payer, ordered the treasurer to correct the assessment roll. Although something is said as to the auditor's right to make such correction, it was not necessary to a disposition of the case. The decision rests upon other unquestioned grounds. Where the assessment is erroneous as being excessive, the only remedy of the property owner is by application to the board of equalization, and by appeal therefrom to the courts. *Nugent v. Bates*, 51 Iowa, 77; *Wilson v. Cass County*, 69 Iowa, 147; *Harris v. Fremont County*, 63 Iowa, 639. But these cases presuppose an assessment of which complaint is made, and this suggests the question whether the entry here of three thousand one hundred and fifty dollars is in fact or in law an assessment. True, it appears upon the assessment roll, but not by the voluntary act of the assessor. An assessment would seem to require a decision or conclusion upon the assessor's part,

as well as an entry of the amount by him. As bearing somewhat on this proposition, see *Burnham v. Barber*, 70 Iowa, 87; *Snell v. City of Ft. Dodge*, 45 Iowa, 564. In the case at bar both of these elements were lacking. The assessor neither fixed three thousand one hundred and fifty dollars as the valuation of the plaintiff's property, nor did he enter that amount. These figures got upon the roll through a clerical error in copying. Now, plaintiff does not complain of the amount that the assessor did in fact fix as the valuation of the property, viz. three hundred and ten dollars. The real ground of complaint is not of an assessment, but rather of a valuation which was never assessed. Section 841,

1 Code 1873, provides: "The county auditor may correct any clerical or other error in the assessment or tax books, and when such correction, affecting the amount of tax, is made after the books have passed into the hands of the treasurer, he shall charge the treasurer with all sums added to the several taxes and credit him with all deductions therefrom and report the same to the supervisors." The power here given the auditor, we have held, includes the power to determine when a mistake has been made. *Fuller v. Butler*, 72 Iowa, 729. The word "mistake," as used in this section, does not include, of course, errors of judgment on the part of the assessor, but is meant, perhaps, to cover all cases where the record does not disclose the true facts, and in which the matter of judgment or discretion is not involved. Certainly it includes an error purely clerical, such as we have in the case at bar. When the determination of whether there is a mistake depends upon the facts outside of the record, though it is nevertheless within the power of the auditor to act, yet we think it is wise for him to decline doing so, as he did in this case, until the matter has been passed upon by the court. The entry complained of never having received the sanction of the assessor, it is not in truth and law an assessment, and plaintiffs should not be prejudiced by the fact that they did not go before the board of equalization for relief. As bearing upon

this question, see *Macklot v. City of Davenport*, 17 Iowa, 379; *Smith v. Osburn*, 53 Iowa, 474; *Wangler v. Blackhawk County*, 56 Iowa, 384. We are not inclined to allow any weight to the fact that plaintiff or his assignor was informed in writing by the assessor of the valuation put upon the property. The statute requiring this action on the part of the officer was passed by the Eighteenth General Assembly, this particular provision being section 2 of chapter 109. In *Henkle v. Town of Keota*, 68 Iowa, 334, the intimation was quite strong that this section is unconstitutional. This case is not mentioned by counsel in argument, and, as a determination of the issue presented by the fact mentioned is not necessary to a decision of the present case, we pass the matter without further mention.

III. In the second of the two cases under consideration the trial court gave plaintiff a judgment against Polk county for taxes paid on the valuation in excess of three hundred and ten dollars. It is urged here by appellants that no claim was ever presented to the board of supervisors, and that this was a necessary prerequisite to the right to maintain an action against the county. *Bibbins v. Clark*, 90 Iowa, 230, and cases therein cited, support this claim. Nevertheless we do not think such defense can be sustained in this case, for the reason that the question is first presented in this court; and we may say the same of the objection urged that the assignment to plaintiff of the cause of action is not shown. Issues of this kind, if not raised in a timely and proper manner, will be deemed waived. *Reed v. City of Muscatine*, 104 Iowa, 183, and cases cited. Our conclusion is that in both cases the judgment of the trial court must be AFFIRMED.



In Re Statement of Consent by Certain Voters in the City  
of Atlantic to the Sale of Intoxicating Liquors in  
said City, under Chapter 6, Title 12 of the  
Code of 1897, *et al.*, JOHN HUD-  
SPETH, Appellants.

**Mulct Law Consent: POPULATION OF CITIES:** *Best evidence.* In proceedings under Code, sections 2448, 2450, providing for the licensing of saloons in cities of 5,000 or more inhabitants, upon the petition or statement of consent by a majority of the people of the city, the official register of the state is conclusive evidence as to the number of inhabitants in the city for which the petition is filed.

*Appeal from Cass District Court.*—HON. W. R. GREEN,  
Judge.

SATURDAY, MAY 13, 1899.

THIS case is before us on appeal, by the parties filing the statement of consent, from the judgment of the district court, "that the said petition and statement of general consent is, and the same is adjudged, insufficient," and for costs against appellants.—*Affirmed.*

*Henry Vollmer and John Hudspeth* for appellants.

*John W. Scott, Frank Temple, J. B. Bruff, and C. A. Meredith,* County Attorney, for appellees.

GIVEN, J.—This proceeding is under sections 2448 and 2450 of the Code, and is upon the basis that in September, 1897, the city of Atlantic was a city of five thousand or more inhabitants. If this were true, then, so far as we are called upon to consider it, the statement of consent was sufficient, and should have been sustained. Remonstrances were filed by a large number of citizens upon the ground, among others,

that Atlantic was not a city of five thousand or more inhabitants. The only evidence introduced to sustain the claim of the appellants was a census taken in September, 1897, by three citizens, under authority of a resolution passed by the city council. These citizens reported, under oath, that: "We found five thousand and twenty-two people living at Atlantic, Iowa, at the time of that enumeration." Appellees introduced in evidence the Iowa Official Register for the year 1897, together with a certificate of the secretary of state, in so far as it relates to the number of inhabitants of the city of Atlantic according to the last state census. This evidence shows that according to the census of 1895 the inhabitants of said city number four thousand nine hundred and fifty, and it is insisted by appellees that this evidence is controlling. Chapter 8, title 2, of the Code, after providing for taking the census, provides that the executive council shall cause abstracts or compilations of said census to be prepared and recorded by the secretary of state. Section 176 is as follows: "Population to be Published in Official Register. It shall be the duty of the secretary of state to publish in the Iowa Official Register the population of counties, cities and towns as shown by the last census, either state or national, and when the printing is completed the secretary of state shall certify that the same includes the census publication required by law, and such certificate, with the date and signature, shall be printed on the page following the title page thereof." Section 177: "Such Publication to be Evidence. Whenever in this Code the population of any county, city or town is referred to, it shall be determined by the publication above provided for as of the date of said certificate, and such census publication shall be evidence of all matters therein contained, and of said certificate thereto." It will be observed that the word "population" is used in these sections, while in section 2448 the word "inhabitants" is used, and in section 2449 we find the word "population." It is

entirely clear that these words are used in the same sense in these sections, and that whenever the number of inhabitants or population of counties, cities, or towns is to be determined, the last census, as shown by the Official Register, must control, so far as the proceedings under consideration are concerned. Whatever the right of the cities and towns may be as to taking enumerations of their inhabitants, we think that a proceeding like this may not be based upon such an enumeration. To so hold would lead to frequent contests as to such enumerations, and defeat what we think is the plain purpose of the statute, namely, that proceedings like this must be based upon the last census. It is undisputed that according to the last census, as shown by the Iowa Official Register, the city of Atlantic was not a city of five thousand or more inhabitants, and therefore we conclude that neither the board of supervisors nor district court erred in holding that the statement of consent was insufficient.—  
AFFIRMED.

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D. B. FISK & COMPANY, Appellant, v. HENRY RICKEL.

**Continuing Guaranty.** A continuing guaranty which is not exhausted by the extension of credit to the limit named is evidenced by an instrument whereby one party, in consideration that the other will sell goods upon credit, to a third person, from time to time guarantees the prompt payment of all bills at their maturity, "said maturity to be sixty days from date of bills; hereby waiving any and all notice of times or amounts of sales or of defaults or delays in the payment therefor, not exceeding \$400.00."

*Appeal from Cedar Rapids Superior Court.*—HON. T. M. GIBERSON, Judge.

MONDAY, MAY 15, 1899.

ACTION upon a written guaranty of a certain account. Defendant demurred to the petition, which set out the facts

in full. The demurrer was sustained. Plaintiff refusing to plead further, judgment was rendered in defendant's favor for costs. Plaintiff appeals.—*Reversed*.

*W. L. Crissman and C. D. Harrison* for appellant.

*Preston & Wheeler and Rickel & Crocker* for appellee.

WATERMAN, J.—The guaranty was in this form: "Chicago, Ill., Sept. 22, 1893. In consideration that D. B. Fisk & Co., of Chicago, Ill., will and do sell to Mrs. J. W. Cook, West Union, Iowa, upon credit, sundry bills of goods from time to time as she may purchase or order, I, the undersigned, do hereby guaranty to said D. B. Fisk & Co. the prompt payment of all such bills at their maturity,—said maturity to be sixty days from date of bills; hereby waiving any and all notice of times or amounts of sales, or of defaults or delays in the payment therefor. Not exceeding four hundred dollars. Henry Rickel." As stated by appellee, two questions are raised by the demurrer: (1) Was this a continuing guaranty? and (2) was the amount fixed intended as a limit to the credit to be extended to Mrs. Cook, as well as to the liability of defendant? There is really but one question presented, for the propositions stated are identical. A continuing guaranty is one in which the parties look to a future course of dealing for an indefinite time. In such case the amount fixed in the instrument is a restriction upon the guarantor's liability only, and not upon the amount of credit that may be given to the debtor. *Douglass v. Reynolds*, 7 Pet. 113; *Twohy v. McMurrin*, 57 Minn. 242 (59 N. W. Rep. 301); 9 Am. & Eng. Enc. Law, 77. Looking now to the language of the instrument under consideration, we find that it comprehends various future transactions, and is unlimited as to time. While the contract of a guarantor is not to be extended by implication, yet, as these instruments are of frequent use in the commercial world, upon the faith of which extensive credits are given and large advances made,

care should be taken to hold the party bound to the full extent of his engagement, as the same may be deduced from the language of the contract, read in the light of surrounding circumstances. *Douglass v. Reynolds, supra*; Brandt Suretyship, section 130. We cannot avoid the conclusion that the plaintiff was justified in regarding this as a standing guaranty to the amount of four hundred dollars. A fair construction of its terms, in view of the situation of the parties, is that it was intended to afford a continuing credit to aid the principal in her business venture. It is rare, in cases of this kind, that the language of any particular guaranty is such as to make a decision upon it an authority in construing another. A slight difference of phraseology will alter the legal effect. We find no other case in which the instrument was, in terms, identical with the one we have here. But the cases support the principle upon which we rest our conclusion. In *Douglass v. Reynolds*, cited above, the language of the instrument was: "Our friend —, to assist him in business, may require your aid from time to time. \* \* \* We do hereby bind ourselves \* \* \* for a sum not exceeding," etc. Held a continuing guaranty. A similar holding in *Tootle v. Elgutter*, 14 Neb. 158 (15 N. W. Rep. 228), was founded upon this language: "Please let — have credit for goods to the amount of \$100," etc. In *Crittenden v. Fiske*, 46 Mich. 70 (8 N. W. Rep. 714), the instrument was in terms quite like the one in suit, and it was construed a continuing obligation. See, also, *Rindge v. Judson*, 24 N. Y. 64; *Bent v. Hartshorn*, 1 Metc. (Mass) 24; *Hatch v. Hobbs*, 12 Gray, 447; *Trustees v. Gilliford*, 139 Ind. 524 (38 N. E. Rep. 404); *Lane v. Mayer*, 15 Ind. App. 382 (44 N. E. Rep. 73); Brandt Suretyships, sections 131, 132.

Without taking time and space to set out the facts, we will say that the cases cited by appellee can all be readily distinguished from the one at bar. In each of them language was used to indicate that the guarantor restricted the amount

of credit to be given, as well as his own liability. The trial court erred in sustaining the demurrer, and its judgment is therefore REVERSED.

**BARTHOLOMEW MARKEY, JR., Appellant, v. PETER MARKEY  
and MARY MARKEY.**

**Bastard: RECOGNITION: Evidence.** The uncorroborated testimony of the sister of the deceased that, about 60 years before, she was present at the marriage of her brother; that plaintiff was the fruit of such marriage; that she was present at the birth, and helped to rear plaintiff after his mother's death, which occurred  
3 when he was about 18 months old,—is not sufficient to establish the legitimacy of plaintiff, when the moral character of witness is shown to be bad, and she is directly contradicted by several witnesses, who had equal opportunity to know the facts, if they had existed.

**SAME.** The provision of Code 1873, section 2466, that to entitle an illegitimate child to inherit from his father, the recognition of the child by the father as his own "must have been general and notorious or in writing," is not satisfied by evidence that plaintiff was reared at the home of the father of deceased in Ireland, when  
4 not elsewhere at work, until he reached the age of 19 or 20, when he came to this country at the expense of the deceased, and went to his house in Illinois, where he remained for two years; that the deceased furnished him with clothing and spending money, collecting his wages, and introduced him as his son to some fifteen persons, five of whom testified to such fact.

**Pleading: ELECTION.** In an action for the partition of the estate of a decedent, where the plaintiff claims an interest as a child and heir of the deceased, and afterwards, in an amendment to his  
2 petition, alleges that the deceased, "during his lifetime, always recognized the plaintiff as his son," he is not required to elect whether he will claim as a legitimate son or as a recognized illegitimate child.

**Appeal: ABSTRACT.** The supreme court will not strike an additional abstract, filed by appellee, on the ground that the same does not  
1 add to or take anything from appellant's abstract, when a comparison of the abstract shows that the additional abstract is necessary to a full understanding of the case.

*Appeal from Plymouth District Court.*—HON. GEORGE W.  
WAKEFIELD, Judge.

\*Whether one may claim as a legitimate son and recognized bastard is not decided, because the petitions here do not aver that claimant was illegitimate.—Reporter.

108	373
110	678
108	373
114	40
108	373
123	172
108	373
133	302

MONDAY, MAY 15, 1899.

PLAINTIFF alleges in his petition that about May 1, 1879, Bartholomew Markey died intestate, seised in fee of a certain eighty acres of land, described, and that he "left surviving him, as his children and only heirs at law, the plaintiff and the defendant Peter Markey, his half-brother, and the deceased also left surviving him, as his widow, the defendant Mary Markey;" that the plaintiff and defendants are each entitled to one undivided one-third part of said land; and asking judgment confirming said shares, and for partition. The defendants answered, denying "that plaintiff is an heir at law" of said deceased, or entitled to any interest in said land. After the evidence was submitted, the plaintiff amended his petition, alleging that deceased "did, during his lifetime, always recognize the plaintiff as his son and as his child, and represented himself as the father of plaintiff, and such recognition was a general and notorious recognition of such relationship." Defendants answered this amendment, denying the allegations thereof, and averring that whatever recognition, if any, was made, was in the state of Illinois, and that by the law of Illinois, in force at the time, plaintiff could not, as an illegitimate son of deceased, inherit property by virtue of any recognition from his father. Other allegations are made in the petition and answer as to the rents of the land and other matters, which, in view of our conclusion on the issue of plaintiff's heirship, need not be set out. Decree was rendered dismissing plaintiff's petition, and judgment for cost rendered against him, from which he appeals. The defendant Mary Markey having departed this life pending this action, the controversy is solely between this plaintiff and the defendant Peter Markey.—*Affirmed.*

*E. T. Bedell* and *Ira T. Martin* for appellant.

*I. S. Struble* for appellees.

GIVEN, J.—I. Appellant moves to strike appellees' additional abstract, and to tax the cost thereof to appellees on the grounds that the denial of appellant's abstract is not sufficiently specific; that the matter set out does  
1 not add to or take from appellant's abstract, and does not show that appellant's abstract is defective. The denial is sufficiently specific, and a comparison of the abstracts shows that the additional abstract is necessary to a full understanding of the case. The motion is overruled.

II. Appellant, in his original petition, claims as child and heir at law of deceased, and in his amendment because deceased did, during his lifetime, generally and notoriously recognize the plaintiff as his son. Question is made  
2 whether the plaintiff may, in view of the allegations of his petition, also rest the claim upon the allegations of his amendment. Whether he may claim as legitimate son and also as a generally and notoriously recognized illegitimate son we do not determine. It will be observed that plaintiff does not allege in his petition or amendment whether he is the legitimate or illegitimate son of deceased, and we therefore proceed to consider the case on its merits on both claims.

III. Plaintiff introduced the deposition of Ellen Sharkey, aged seventy years, sister of the deceased, and for many years a resident of Chicago, Ill. If the testimony of this witness  
3 is to be credited, there can be no doubt that the plaintiff is the legitimate son of deceased. She testifies that about sixty years ago she was present at the marriage of her brother to Bessie McIntee, in the chapel in parish Markilone, county Monaghan, Ireland; that plaintiff was born as the fruit of such marriage, in her father's house; that she was present at the birth, and helped rear the plaintiff after his mother's death, which occurred when he was about thirteen months of age. She also states that she was present at the death of plaintiff's mother. This witness



is uncorroborated as to the fact of the marriage, the birth of the plaintiff at her father's house, and the death of his mother, and is directly contradicted by several witnesses who had equal opportunity to know the facts if they had existed. She is also shown by several witnesses to be a woman of dissolute habits and bad moral character. We need not say more as to the evidence on this branch of the case than that it fails to convince us that the plaintiff is the legitimate son of the deceased.

IV. Under section 2466 of the Code of 1873 illegitimate children inherit from their father "whenever the paternity is proven during the life of the father, or that have been recognized by him as his children, but such recognition must have been general and notorious or else in writing."

It appears that the plaintiff was left in the family of  
4 Peter Markey, father of the deceased, in Ireland, and was reared and had his home there when not elsewhere at work, until he reached the age of nineteen or twenty. At that time (1857) he came to this country, and went to the home of the deceased, in Illinois, where he remained part of the time up to 1859. The evidence relied upon as establishing recognition is substantially as follows: Plaintiff testifies to frequent acts of recognition while in Illinois, and that the deceased furnished him with clothing and spending money, and collected his wages for work done for others. He also testifies: "He wrote to me, and paid my passage to this country, in 1857, to Chicago. I wrote, and he sent me five dollars to Williams & Geyer, steamboat agents in New York, Black Ball Line. He bought clothes for me at Wayne station. He at times sent me some money." Plaintiff named some fifteen persons to whom he says the deceased introduced him as his son. Also that deceased introduced plaintiff's wife as his daughter-in-law, and kept her at his house. Five witnesses testified to deceased's having spoken of or to the plaintiff as his son on a number of occasions while residing in Illinois. There is no evidence of any recognition

while the parties resided in Ireland, nor after they separated in Illinois, nor of any communication between them. This evidence of recognition cannot, in the nature of things, be controverted, and for that reason it should be carefully scrutinized, and received with caution. As said in *Crouch v. Hooper*, 16 Beav. 182: "It is also necessary to remember that in these cases, from the nature of the evidence given, it is not subject to any worldly sanction, it being obviously impossible that any witness should be convicted of perjury for speaking of what he remembers to have been said in a conversation with a deceased person." See *Laurence v. Laurence*, 164 Ill. 367 (45 N. E. Rep. 1073). While it must be said that there is evidence tending to establish recognition, yet, in view of its nature, the length of time that has elapsed, the long periods in which there was no communication between the deceased and the plaintiff, this evidence fails to convince the mind to that degree of certainty that should obtain in such matters that the deceased ever did generally and notoriously recognize the plaintiff as his son. In view of all the circumstances, the fact that plaintiff bought him clothes, furnished him food and shelter, and on one or two occasions collected his wages, does not necessarily indicate the recognition of him as his son. We conclude upon the whole record, that the decree of the district court is correct, and it is AFFIRMED.

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W. D. BRANSTRATOR, Appellant, v. KEOKUK & WESTERN  
RAILWAY COMPANY.

108 377  
122 528

**Master and Servant: RAILROADS.** An employe of an independent contractor engaged by a railroad company to load slack on cars, cannot recover from the company for personal injuries caused by the falling of a piece of slack, upon the ground that he relied upon the company's promise, made to the contractor's employes, to cool the top of the pile with water, since the promise to repair is only important to rebut the inference that defects are waived

by continuance in employment with knowledge of their existence; and as the company had no duty in the premises, the employe waived nothing by continuing in the contractor's employment.

**ASSUMING RISK OF EMPLOYMENT.** Where a railroad company employs a person to remove a pile of slack, and all the dangers incident thereto were obvious to such person, it is not liable for negligence to an employe of such person who is burned by the slack, where it is in the same condition and in the same location when the injuries are received as when the contract was made.

*Appeal from Appanoose District Court.*—HON. M. A. ROBERTS, Judge.

MONDAY, MAY 15, 1899.

THE petition alleges that the defendant employed one Anderson to load slack on cars at a particular side track, at a specified price per car; that the slack was in a pile twenty feet or more high next to this track; that, as taken from the coal mine, it was dumped on the top of the pile, where it burned and smouldered, while the bottom was cool and could be shoveled on the cars; that the defendant, knowing that between the pile and the car was a dangerous place to work, took no precaution to protect the plaintiff or other employes of Anderson; that it did not pour water on the top of the pile to cool it, though this the defendant so promised on plaintiff's complaint, and plaintiff, by reason of such promise, continued at such work; that because of defendant's failure to make the place where plaintiff worked safe, by protecting it from the falling slack on the steep side of the pile, or cooling it with water, a large chunk or mass fell or slipped down, striking him on the arm and injuring him; that he knew nothing of the danger referred to; and he asks damages. The defendant demurred to the petition on the ground that it affirmatively appeared that plaintiff was not the servant or employe of the defendant, or under its control, at the time he claims to have been injured, but was the servant and was an employe of an independent contractor of the defendant. This demurrer was sustained, and, the plaintiff electing to stand thereon,

judgment was rendered dismissing the petition, and he appeals.—*Affirmed.*

*Vermillion & Valentine* for appellant.

*Baker & Moore*, for appellee.

LADD, J.—There can be no controversy over the proposition that the master must furnish suitable machinery for the use of the servant and a safe place for him to work. But here Anderson, and not the defendant, was the master. *Humpton v. Unterkircher*, 97 Iowa, 509. The liability of the defendant, if any, cannot depend upon, or rise out of, any contract with the plaintiff, for there was none, but must rest on its neglect of some duty which it had undertaken towards him in common with other laborers of Anderson. *Toomey v. Donovan*, 158 Mass. 232 (33 N. E. Rep. 396); *Johnson v. Spear*, 76 Mich. 139 (42 N. W. Rep. 1092); *Neimeyer v. Weyerhaeuser*, 95 Iowa, 497. It was not remiss in its duty with respect to appliances of machinery, for it had agreed to furnish none. Was defendant negligent with respect to the place where the work was to be done? The contract was made with reference to the pile of slack in the same condition, and the track in the same location, as when the accident happened. All the dangers incident thereto were obvious to Anderson. But it is said that the plaintiff complained, and the defendant promised to cool the slack by throwing water on it, and because of this promise he continued work, and was injured. As the defendant had omitted no duty in complying with its obligations, the plaintiff waived nothing by continuing in Anderson's employment. The promise to repair is only important as rebutting the inference that defects are waived by continuance in employment with knowledge of their existence. *Ford v. Railway Co.*, 106 Iowa, 85. The demurrer was rightly sustained, and the judgment is **AFFIRMED**.

GERMAN SAVINGS BANK, of Des Moines, Iowa, Appellant,  
v. CAPITAL CITY OATMEAL COMPANY.

**Attachments: LEVY:** *Subsequent writ.* Where an officer holds actual possession of personal property under a writ of attachment, no affirmative act on his part is necessary in making a levy under a subsequent writ, but he may treat the property as seized, and make his return accordingly.

*Appeal from Polk District Court.*—HON. C. P. HOLMES,  
JUDGE.

MONDAY, MAY 15, 1899.

JANUARY 25, 1897, H. T. Blackburn, as receiver, commenced action against the Capital City Oatmeal Company to foreclose a chattel mortgage on certain personal property, the description of which is not essential. Thereafter the German Savings Bank, of Des Moines, Iowa, of which Blackburn was receiver, was substituted as party plaintiff. To the suit, J. E. Stout, sheriff, J. M. Brown, the McFarlin Grain Company, and M. Riley are defendants. Brown, the McFarlin Grain Company, and Riley, each claimed a lien on the mortgaged property as an attaching creditor, and each claimed a priority over the plaintiff's mortgage. The adjudication settled, and it is not now questioned, that the Brown and McFarlin Grain Company attachments are first liens, leaving the controversy as to the plaintiff's mortgage and the Riley attachment. It is now conceded that the Brown attachment is the first lien, and it was levied on January 22, 1897, at 5:15 o'clock P. M. Plaintiff's mortgage was executed about 8 o'clock P. M. of the same day, and filed for record at 9 o'clock P. M. There is a controversy as to the time of levying the Riley attachment, the dispute being whether it was 7:31 or 8:40 P. M. of the same day; the

earlier time making it prior, and the later one after, the execution of the mortgage. It is the question of the priority of these two liens that is involved in this appeal. The district court gave priority to the Riley attachment, and the plaintiff appealed.—*Affirmed.*

*Dowell & Parrish* for appellant.

*Brennan & Brennan* for appellee.

GRANGER, J.—The first return on the Riley attachment fixed the levy at 8:40 P. M. on the twenty-second day of January, 1897, and that it came into the hands of the sheriff at 7:30 P. M. of the same day. At the trial this return was put in evidence, and later, but before the submission of the cause, the court permitted the defendant to put in evidence an amended return showing the levy to have been made at 7:31 P. M. and notice of the levy to have been given to the president of the oatmeal company at 8:40 P. M. We do not understand appellant to question the right to put in evidence the return as amended, but the court permitted oral evidence, with a view to contradict the return as amended, which right is questioned here by appellant; but we think it is not important to consider the question, because, with such evidence in the record, the levy was made in accord with the amended return. There is a plain distinction between the return of the levy and the notice of the levy. The facts, somewhat in detail, are that the Brown attachment had been levied at 5:15 P. M., and when the Riley attachment was received, at 7:30, the property was then in the possession of the sheriff; and he did nothing, in executing the levy, other than to regard it as made, and make his return accordingly, aside from giving the notice, which was done at 8:40 of the same evening. The levy is made by taking manual custody of the property. Code, section 3898. This had been done under the Brown attachment. When property is thus in custody, and a second

attachment is to be levied, no overt act is essential to effect the levy. The officer can only treat the property as seized, and make his return accordingly. In Drake Attachment, section 269, it is said: "If it be desired to attach property already attached and in an officer's custody, the writ should be delivered to and executed by him, when it will be available to hold the surplus after satisfying the previous attachment, or the whole, if that attachment should be dissolved. In such case no overt act on the part of the officer is necessary to effect the second levy, but a return of it on the writ will be sufficient. \* \* \* So, where the property is in the hands of a bailee, the officer who placed it there may make another attachment, without the necessity of an actual seizure, by making return thereof, and giving notice to the bailee." The rule has numerous cases cited for its support. As we view the record, the first return was made, fixing the levy as made at 8:40, because that was the time of giving the notice, rather than the time when the property was really seized by virtue of the writ; for it was, in legal effect, a seizure when the writ became operative to hold it, which must have been when the officer treated the writ as levied. This question of fact concludes the case, and the judgment is **AFFIRMED.**

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SARAH A. SMITH, Appellant, v. CONTINENTAL INSURANCE COMPANY.

**Insurance: RIGHT TO PROCEEDS.** Under a policy insuring a dwelling house and household furniture against fire, in which the insurer consents that the loss on buildings shall be payable to the mortgagee as his interest may appear, the insurance on the personalty belongs to the insured.

**FORFEITURE: Homestead.** A policy of insurance on real property having a provision that it shall be null and void if the property become mortgaged or incumbered, is not forfeited because of judgments rendered where the insured property is a part of the homestead, as the lien of the judgments did not attach thereto.

108 382  
110 381

108 382  
116 378

108 382  
125 209

**WAIVER OF PROOF OF LOSS.** An insurance company has power to waive proof of loss notwithstanding the stipulation in the policy that no agent or employe of the company or any other person or  
5 persons than the general manager of western department, shall have authority to waive or alter any of the terms or conditions of the policy.

**RULE APPLIED.** An installment of an insurance premium being unpaid, the insurer wrote insured, requesting payment, and again wrote that, though the insurance was suspended because of the non-payment of the installment, he had better pay it and revive the policy. Insured having sent the installment immediately after  
4 the loss, the insurer returned it; stating it could not retain it, as  
5 the payment was delinquent when the loss occurred. Shortly thereafter insurer wrote insured's attorney that it had complied with the law as to the collection of premium notes, and wrote its soliciting agent, in answer to a letter written in the interest of insured, stating it had not given the loss any attention, because installment had not been paid. *Held*, to authorize a finding of waiver of proof of loss.

**EVIDENCE.** Letters in the name of an insurance company and signed in its name by one who assumes to be its general adjuster, written  
5 in response to letters written by the company with reference to a loss, will be presumed to have been duly authorized by the company.

**RULE APPLIED.** A fire insurance policy stipulated that no one but the general manager of the company could waive conditions. After default in an installment of the premium, such officer wrote insured, requesting payment, and stating that the policy  
5 was suspended. A loss occurred while the default existed, and thereafter, in response to letters received, letters were written in the name of the company, signed by the general adjuster, which denied liability because of non-payment of the premium, thereby waiving proof of loss. *Held*, that it would be presumed that the company duly authorized such letters.

**PAYMENT AFTER LOSS.** Offer by insured, after loss, of premium, which insurer refused to accept, and which insured knew before the loss  
8 was due and unpaid, gives him no right to recover.

**ACTION ON POLICY: Beneficiary.** One to whom a policy of insurance is issued, may maintain an action thereon although the loss is made payable to the mortgagee, as his interest may appear, in  
1 view of Code 1878, section 254, providing that a party with whom or in whose name a contract is made for the benefit of another, may sue in his own name, without joining with him, the party for whose benefit the suit is prosecuted.

**DEFENSES: Pleading.** Under Code, 1878, sections 2715, 2717, (Code, sections 3626, 3628), allowing a party to allege generally perfor-



mance of conditions precedent but requiring one controverting such allegation to state specifically the facts relied on, where insured, suing for a loss, alleges compliance with the policy and the law, the insurer, in order to avail himself of the defense that insured failed to submit to an appraisal as required by the policy, must specially allege such fact.

**Appeal:** OBJECTION BELOW. An insurance company which failed to plead specially the failure of plaintiff to submit to an appraisal under the terms of the policy, cannot, for the first time on appeal, insist upon such failure as a defense.

**NOTICE OF SUSPENSION.** Acts First General Assembly, chapter 210, provided that an insurer may within thirty days prior to, or at any time after maturity, or of an installment thereof, serve a written notice on insured, personally or by registered letter, and that no policy should be suspended for non-payment of the amount until thirty days after such notice had been served. *Held*, that where insurer mailed a notice in a registered letter, on which he requested a return if not delivered within fifteen days, and, because of its return, insured did not receive it, the policy was not suspended, though, in returning it, the postmaster violated the regulation requiring registered letters to be kept at the delivery postoffice thirty days.

**SAME.** Acts Eighteenth General Assembly, chapter 210, provides that an insurer may give notice to insured of maturity of a premium, or installment thereof; the notice to state the amount due, or which will be due, and also the amount required the pay customary short rates and expenses in order to cancel the policy; which will not be suspended until 30 days after such notice was served. *Held*, that a notice by an insurer, who had issued two policies to one person, stating the aggregate amounts required to cancel both policies and to pay the premiums due on both, was insufficient to suspend one of the policies.

*Appeal from Calhoun District Court.*—HON. S. M. ELWOOD,  
Judge.

MONDAY, MAY 15, 1899.

ACTION at law to recover an amount alleged to be due on a policy of insurance. A jury was impaneled, a verdict was directed for the defendant, and a judgment was rendered in its favor for costs. The plaintiff appeals.—*Reversed*.

*Hutchison & Jacobs*, for appellant.

*Stevenson & Lavender*, for appellee.

ROBINSON, C. J.—The policy in suit purports to insure the plaintiff against loss or damage by fire, to the amount of four hundred dollars, on a dwelling house, and three hundred dollars on furniture and other household property, for the term of five years from the sixth day of February, 1892. On the twenty-fifth day of January, 1896, the dwelling house and nearly or quite all of the personal property insured were destroyed by fire; and the plaintiff seeks to recover, on account of the loss sustained, the amount of the policy. The answer denies all liability, and pleads various defenses. The verdict was directed on the motion of the defendant.

I. It is alleged as the first ground of the motion that the plaintiff is not the real party in interest. That ground is based upon the fact that the policy provides that the defendant “consents that the loss, if any, on buildings under this policy, after the same shall have been ascertained, and duly verified by the assured, shall be payable to Edward Bremer, mortgagee, as his interest may appear, for and on  
1 account of said assured.” That provision did not give to Bremer any interest in the insurance on the personal property, and the plaintiff is the owner of that, and entitled to any recovery on account of it which the policy authorized. Section 2544 of the Code of 1873, which was in force when this action commenced, provided that a party with whom or in whose name a contract is made for the benefit of another might sue in his own name without joining with him the party for whose benefit the suit would be prosecuted. That was construed in *Stevens v. Insurance Co.*, 69 Iowa, 658, and held to authorize a suit by the assured to recover insurance pledged to a mortgagee. It is true, the mortgagee intervened in that case, but the right of the assured to maintain the action was not made to depend upon the intervention. The case of *Worley v. Insurance Co.*, 91 Iowa, 150, does not announce a contrary rule. We conclude that the plaintiff, if any one, is authorized to maintain this action.

II. Thesecond ground of the motion for a verdict is that certain installments of the premium note given by the plaintiff for the insurance were due and unpaid when the loss occurred. The policy contains the following: "It is expressly agreed that this company shall not be liable for any loss or damage that may occur to the property herein mentioned while any promissory note or obligation, or part thereof, given for the premium, remains past due and unpaid. Payments of notes must be to the Continental Insurance Company at its office in Chicago, Illinois, or its office in New York, or to an authorized person having such note in possession for collection. The company may collect, by suit or otherwise, the premium note or notes; and a receipt from the office of the company must be received by the assured before there can be a revival of the policy, which shall in no event carry the insurance beyond the original term." It is admitted that at the time the loss occurred an installment of the premium note due on the first day of February, 1895, was unpaid. But it is claimed that the defendant failed to comply with the statute of this state which applied to such cases, and, therefore, that the policy was not suspended by the nonpayment of the installment due.

Chapter 210 of the Acts of the Eighteenth General Assembly, in force when the policy in suit was issued and when the loss in question occurred, contains the following:

"Section 1. In every instance where a fire insurance company or association doing business in this state shall hereafter take a note or contract for the premium on any insurance policy such insurance company or association  
2 shall not declare such policy forfeited, or suspended for nonpayment of such note or contract except as herein provided, anything in the policy or application to the contrary notwithstanding.

"Section 2. Within thirty days prior to or at any time after the maturity of any note or contract, whether assessable or where the time of payment is fixed in the contract, given

for the premium on any policy of insurance, such company or association may serve a notice in writing upon the insured that his note or an installment thereof, is due, or to become due, stating the amount which will be due on the note or contract, and also the amount required to pay the customary short rates, including the expense of taking the risk up to the time the policy will be suspended under the notice in order to cancel the policy, and that unless payment is made within thirty days his policy will be suspended. Such notice may be served either personally or by registered letter addressed to the assured, at his postoffice address named in or on the policy, and no policy of insurance shall be suspended for non-payment of such amount until thirty days after such notice has been served."

On the second day of January, 1895, the defendant mailed to the address of the plaintiff, in a registered envelope, a notice which stated that the fourth installment of her premium for insurance would fall due on the first day  
3 of February, 1895, that the amount required to cancel her contract for customary short rates and expenses was thirteen dollars and eighty-four cents and that the amount required to pay the fourth installment for insurance "under policy No. 580,757 & 8" was ten dollars and fifty cents. Ordinarily the service of the notice is complete when it is registered and mailed. *Ross v. Insurance Co.*, 83 Iowa, 586; *Holbrook v. Insurance Co.*, 86 Iowa, 255; *Morrow v. Insurance Co.*, 84 Iowa, 256. But in a corner of the envelope in which the notice in question was mailed to the plaintiff was printed the following: "Postmaster will oblige by facilitating delivery. If not delivered within fifteen days return to Continental Fire Ins. Company, Rialto Building, Chicago." The plaintiff offered to show that she did not receive the notice; that she called at the post office for mail after the expiration of the fifteen days specified on the envelope, but within thirty days from the time it was mailed; and that the reason she did not receive the notice was that it had been

returned to the defendant pursuant to the request on the envelope. But an objection to the offered testimony was sustained. We are of the opinion that the testimony should have been received. The law was designed to give to the assured at least thirty days from the mailing of the notice in which to receive it, and make the payment to which it referred. If the insurance company may shorten the time for delivery to fifteen days, it may as well shorten it to ten or five days. It is said the postal regulations required that registered letters be kept at the office of delivery thirty days, and that it must be presumed that the postmaster at that office discharged his duty, notwithstanding the request for return on the envelope. But, if the notice was returned to the defendant as requested, it cannot be heard to say that the return was in violation of law, and the plaintiff was entitled to prove the fact.

III. The notice sent was defective in substance. At the time the policy in suit, which is numbered B580,757, was issued, a policy, numbered B580,758, insuring the plaintiff against loss by tornadoes, was also issued by the defendant. The premium on the fire policy was to be thirty dollars; and on the tornado policy twenty-two dollars and fifty cents. For these amounts the plaintiff gave two notes—the first for ten dollars and fifty cents, and the second for forty-two dollars. The notice sent did not designate the amount required to pay the customary short rates, nor the amount of the installment about to fall due, on either policy, but stated that the fourth installment of “your premium for insurance” would  
4 fall due on the day specified, and the amount required “to cancel your contract” for customary short rates and expenses was thirteen dollars and eighty-four cents, and that the ten dollars and fifty cents were required to pay the fourth installment for insurance “under policy No. 580,757 & 8.” It thus appears that the notice treated the two policies as one, although they were separate and distinct. The notice should have specified the amount required to cancel the policy in suit at the customary short rates, and

also the amount of the premium about to become due on account of it, in order to be effectual as a statutory notice. See *Marden v. Insurance Co.*, 85 Iowa, 584; *Harle v. Insurance Co.*, 71 Iowa, 401; *Boyd v. Insurance Co.*, 70 Iowa, 325. The defendant wrote to the plaintiff on the fifteenth day of February, 1895, and again a month later, calling attention to the installment due, and requesting payment, but the letters did not contain the information required by the statute. We conclude that the jury might have found that the notices given were not sufficient to terminate or suspend the policy.

IV. The next objection to a recovery made by the defendant is that the plaintiff failed to furnish it the proofs of loss required by statute. The plaintiff admits that such proofs were not furnished, but alleges that they were waived, in that the defendant refused to pay the loss, or any part of it, and claimed that the policy was suspended by reason of the nonpayment of premium due. No express waiver is  
5 shown, but it is insisted that the evidence would have authorized the jury to find an implied waiver. The facts relied upon to show the alleged waiver are substantially as follows: In the letter of February, 1895, the defendant called the attention of the plaintiff to the notice previously sent; stating the amount of the installment then due, and expressing a desire that it be sent. The letter did not contain any reference to the effect which the nonpayment of the installment would have upon the policy. In the letter of the next month the defendant stated that, "although the insurance is now suspended by reason of the delinquency [the failure to pay the installment due], it is for your best interest to pay now; thereby discharging a just obligation, and at the same time reviving your policy and securing the benefit your insurance affords." A few days after the loss occurred the plaintiff sent to the defendant the amount of the fourth and fifth installments, which was received by the defendant January 29, 1896. On the third day of February it received

notice of the loss, and on the sixth returned the money in a letter which referred to the loss, and the date on which it occurred, and then stated: "Your premium, the fourth installment of which fell due February 1, 1895, was therefore delinquent at the time the loss occurred, for which reason we are unable to retain the money received, and return the same amount, twenty-one dollars, in currency herewith." On the eighteenth day of the same month it wrote to an attorney for the plaintiff, apparently in answer to a letter received from him, stating in substance that it knew and had complied with the laws of this state which govern the collection of premium notes. Three days later it wrote to its soliciting agent at Lake City, Iowa, in answer to a letter he had written in the interest of plaintiff, in which it stated that the matter of the loss had not received attention, because the fourth installment of premium had not been paid when the loss occurred. In June, 1896, the defendant again wrote to the attorney for the plaintiff, and stated, in effect, that it would not pay the loss, because the fourth installment was delinquent when the loss occurred. Although this was the first letter in which the defendant denied liability in terms, yet the jury would have been authorized to find from the preceding letters that the defendant refused payment of the loss on the ground that the policy was suspended in consequence of the failure of the plaintiff to pay the fourth installment of the premium. If it did refuse payment on that ground, the jury may well have found that proof of loss was waived. *Boyd v. Insurance Co.*, 70 Iowa, 325; *Carson v. Insurance Co.*, 62 Iowa, 433; *Keenan v. Insurance Co.*, 12 Iowa, 126; *Bloom v. Insurance Co.*, 94 Iowa, 359. But the policy contains a provision as follows: "It is stipulated that no agent or employe of this company, or any other person or persons than the general manager of the Western department, at Chicago, Ill., shall have power or authority to waive or alter any of the terms or conditions of this policy, or to make an endorsement hereon, and all agreements by the general manager must be

signed by him." It appears that the general manager of the Western department was J. J. McDonald, and that the only letters of the defendant to which we have referred, written by him, were those of February and March, 1895. As they were written before the loss occurred, they cannot be construed to deny liability for it. But the one written in March, 1895, stated the claim of the defendant, that the policy was then suspended, and may well be considered, in connection with the letters written after, but within sixty days of, the loss, to ascertain the ground on which the defendant denied liability for the loss. The letters written in the year 1896 were in response to letters written to the defendant, were in the name of the defendant, and were signed, "Continental Insurance Company, per F. R. Millard, General Adjuster." Under these circumstances, the letters should be presumed to have been duly authorized by the defendant, and it had the power to waive proof of loss notwithstanding the requirements of the policy. See *Ruthven v. Insurance Co.*, 102 Iowa, 550; *Brock v. Insurance Co.*, 106 Iowa, 30; *Huesinkveld v. Insurance Co.*, 106 Iowa, 229.

V. The policy provides that, "if the property [insured] shall hereafter become mortgaged or incumbered \* \* \* without consent indorsed hereon, then \* \* \* this policy shall be null and void." It appears that several judgments were rendered against the plaintiff after the policy in suit was issued, and consent is not indorsed on the policy. It is shown, however, that the building insured was a part of the homestead of the plaintiff, and the judgments were not liens thereon. *Eddy v. Insurance Co.*, 70 Iowa, 472. Nor were they liens on the personal property insured.

VI. The policy provides that "any difference arising under this policy in case of loss may be settled by appraisal. \* \* \* and, until such appraisal is submitted to, the loss shall not be payable." It is said that by reason of the provision set out, and the failure of the plaintiff to



demand an appraisal, she is not entitled to maintain this action. See *Dee & Sons Co. v. Key City Fire Ins. Co.*, 104 Iowa, 167. We do not find that this question was presented to the district court. The petition states that the plaintiff has performed every act necessary to comply with the terms of the policy and with the law. The defendant failed to plead specially the failure to submit to an appraisal, and it cannot at this time insist upon that defense. Code 1873, sections 2715, 2717; Code, sections 3626, 3628; *Hart v. Association*, 105 Iowa, 717.

VII. There is nothing in this case which requires that doubtful questions be determined in favor of the plaintiff. The evidence tends to show that she well knew before the loss occurred that she had not paid the premium required by her contract. The payment made after the loss was not accepted, and did not confer any right upon her. *McMartin v. Insurance Co.*, 41 Minn. 198 (42 N. W. Rep. 934). She is, however, entitled to stand upon her contract as it is fixed by statute, and there is evidence which tends to show that the contract was in force at the time of the loss.

We conclude that the district court erred in sustaining the motion to direct a verdict. For the errors pointed out, the judgment is REVERSED.

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F. E. ZALESKY v. IOWA STATE INSURANCE COMPANY,  
Appellant.

**Insurance: ELECTION TO REBUILD: *Jury question.*** It is error to submit to the jury the question whether an insurance company can rebuild and replace the destroyed building for the amount of the insurance thereon, after deducting the difference in value between the new building and the old, where it appears by the uncontradicted evidence that the company had an offer from responsible contractors who were willing and able to give bonds for the faithful performance of their contracts, to erect the building for \$400.00 less than the amount of insurance,

*Appeal from Benton District Court.*—HON. G. W. BUEHAM, Judge.

TUESDAY, MAY 16, 1899.

ACTION at law upon a policy of fire insurance. Defendant pleads that it elected to rebuild, pursuant to a clause in its policy, and demanded of plaintiff plans and specifications, which he failed and refused to furnish, but, on the contrary, proceeded to erect the building himself, and that it is discharged from all liability under its contract. Trial to a jury. Verdict and judgment for plaintiff for the amount of the policy, and defendant appeals.—*Reversed.*

*McVey & McVey* for appellant.

*W. C. Scrimegour* and *J. J. Mosnat* for appellee.

DEEMER, J.—This is the second time this case has been before us. The opinion on the first appeal will be found in 102 Iowa, at page 512. On that appeal we held that the trial court was in error in rejecting evidence offered by defendant of its election to rebuild, and we also held that under the terms of the policy the defendant had the right of election to rebuild. After the case was remanded, plaintiff filed an amendment to his reply, in which he pleaded, among other things, that the defendant's agent and adjuster represented to him that he would adjust the loss in a very few days, and that the plaintiff might proceed to rebuild, and that, acting on this statement, plaintiff did proceed to rebuild, and had the structure nearly half completed at the time defendant made its pretended election; that defendant stood by, and knew of plaintiff's rebuilding, and made no objection thereto for more than forty days; that defendant's election to rebuild was not in good faith, but was made for the purpose of hindering and annoying plaintiff in the collection of his claim. He further pleaded that after the fire the defendant demanded that the

amount of the loss be submitted to referees, pursuant to a provision to that effect in the policy, and that the plaintiff was led to believe therefrom that nothing but the amount of the loss was in dispute, and, so believing, he proceeded to rebuild the property destroyed, and that the defendant was estopped from thereafter electing to rebuild. He also pleaded that by the terms of its articles of incorporation the defendant had no power to rebuild, for that the expense in so doing would amount to more than the sum of the insurance upon the building. He also pleaded that, after defendant gave notice of its election, it did nothing further; that it at no time asked of plaintiff permission to rebuild, nor did it object to plaintiff's rebuilding the property insured, and that it cannot be heard to say it elected to rebuild. The only question that the trial court submitted to the jury was whether or not the defendant could rebuild and replace the building for the amount of the insurance thereon after deducting the difference in value between the new building and the old. The defendant asked a peremptory instruction to the effect that, as the evidence showed the defendant could rebuild for the sum specified and authorized by its charter, and as plaintiff failed and refused to furnish plans and specifications for the purpose of enabling it to rebuild, and proceeded, notwithstanding defendant's election, to replace the building himself, he cannot recover. Instead of giving this instruction, the court left it to the jury to determine whether or not defendant could have rebuilt for the amount authorized by its articles of incorporation. The jury evidently found that it could not do so, for it returned a verdict for plaintiff. This appeal, then, presents the single question, was the court in error in submitting that proposition to the jury? The provisions of the articles of incorporation and by-laws of the defendant company authorizing it to rebuild are as follows: "The directors shall settle and pay all losses within three months after they shall have been notified, and have received proofs of loss according to the by-laws and

conditions of insurance, unless they shall judge it expedient within that time to rebuild the house or houses destroyed, or replace or restore the property, or repair the damage sustained, which they are empowered to do, in a convenient time; provided, they do not expend on such building or repairs more than the sum insured on the premises. But no allowance is to be made in estimating damages in any case for building, historical and landscape painting, stucco or carved work, nor are the same to be replaced if destroyed by fire, unless specifically insured. In case of any depreciation, the assured shall pay to the company the difference between the new and the old property; such difference to be determined as provided in section 14 hereof. And if there shall be any policies of other insurance companies thereon, and not contributing to such rebuilding, the assured shall pay to this company the amount thereof, which shall be expended in restoring or repairing the building, subject to the foregoing conditions." Section 14 is as follows: "The directors, upon view of the loss, or in such way as they may deem proper, shall ascertain and determine the amount of the loss or damage, and if the party suffering is not satisfied with the determination of the directors, the question as to the amount of any loss or damage, or the value of the property at the time of the loss, shall, upon demand of either party, be determined by competent referees." The amount of insurance on the building was three thousand dollars. Now, the evidence shows without dispute that defendant had an offer from responsible contractors, who were willing and able to give bonds for the faithful performance of their contracts, to rebuild the building for about the sum of two thousand six hundred dollars. Plaintiff's witnesses testified that it would cost from three thousand nine hundred dollars to four thousand one hundred dollars to reconstruct the building, but the evidence showed that as the building destroyed was sixteen years old, it was worth from twelve to thirty-three and one-third per cent. less

than a new building; so that, on their estimate, the building could be replaced for from three thousand dollars to three thousand five hundred dollars. But the controlling question in the case is the amount it would have cost defendant, and on that issue there was no dispute. Defendant further contends that the question of right to rebuild is *res adjudicata*, it having been determined on the former appeal that it had that right. There is no merit in that contention. All that was determined on the former appeal was that defendant had the right of election to rebuild under the terms of its articles of incorporation and by-laws. There was no determination of the question presented on that appeal. That it had the abstract right to rebuild was determined. But whether or not it had that right, under the facts disclosed in the evidence, was not decided. Some other questions are argued by counsel, which we do not consider, for the reason that the record does not properly present them for solution. For the error in submitting a question about which there was no dispute, the judgment is REVERSED.

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STATE OF IOWA, Appellant, v. WILLIAM BEARDSLEY.

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**Dams:** CONSTITUTIONAL LAW. Laws Seventeenth General Assembly, chapter 188, which provide that the owner or owners of any dam or obstruction across any water course in this State shall within a reasonable time construct and maintain over and across said dam a fish way which will afford a free passage for fish up and down and through said water course, and that any dam not so provided within a reasonable time shall be abated as a public nuisance, is not, as to one who owns on both sides of a stream, and who has maintained a dam there for twenty-three years, unconstitutional, as depriving him of his property without due process of law; nor does such act constitute a taking of private property for public use without just compensation.

**POLICE POWER.** The requirement by the legislature that dams across streams shall be so constructed as not to interfere with the passage of fish is a legitimate exercise of the police power of the state.

**NUISANCE.** It is the province of the legislature, within the fundamental limitations upon its authority, to prescribe what shall constitute a nuisance

**PRESCRIPTION.** By maintaining a dam for twenty years the owner does not acquire a prescriptive right, as against the power of the state to compel the erection of fish ways.

**Practice: CHALLENGING AUTHORITY OF ATTORNEY.** Code 1878, section 214, which provides that the court may, on motion of either party to an action, require the attorney for the adverse party to produce or prove the authority under which he appears, and, until he does so, may stay all proceedings by him in behalf of those for whom he assumes to act, provides the exclusive method of testing the authority of attorneys; and such authority may not be assailed by answer.

**PLEADING AND PROOF.** An allegation in an answer setting up a lack of authority on the part of the attorneys to commence the action is an affirmative defense, and is denied by operation of law, and the action would not abate until such want of authority was proven.

*Appeal from Mahaska District Court.*—HON. A. R. DEWEY, Judge.

TUESDAY, MAY 16, 1899.

THE defendant is the owner of about one hundred acres of land, through which flows Skunk river. The defendant is now, and has been for some years, maintaining a dam across said river, on his premises, in a way to obstruct the free passage of fish up and down said river; and he has neglected, and still neglects and refuses, to construct and maintain over or across said dam a fishway for the passage of fish up and down said river. This action is brought to have said dam adjudged a nuisance and have the same abated. The issues present several propositions, which will be noticed in the proper connection. The district court gave judgment for defendant, and the state appealed.—*Reversed.*

*Milton Remley*, Attorney General, *James Carroll*, B. W. *Preston*, and *J. F.* and *W. R. Lacey* for the State.

*L. C. Blanchard* for appellee.

GRANGER, J.—I. The action was commenced in September, 1895, by the filing of the petition, signed “Carroll, Lacey, and Preston, attorneys for plaintiff.” The answer was filed October 1, 1895, and one division of it is that “the parties commencing this action have no right or authority to commence or prosecute this action, that they have no power or authority to represent the state, and that this action can only be prosecuted by the attorney general or other proper state officers.” The point is now urged in argument. It is not doubted that the state is the proper party; the controversy being as to the attorneys who first appeared for the state,—the thought being that the attorneys are the parties prosecuting. The question, it seems to us, must turn on whether the attorneys have authority to appear, as such, for the state; and whether they have such authority or

1 not is a question of fact, for, as the averment is in the answer, in the nature of an affirmative defense or plea, it is denied by the operation of law, and before the suit could be abated for want of such authority, the fact must be made to appear, and no further attention seems to have been given the question. We must say, however,

2 that it is doubtful if a suit could be abated, or even delayed, by such a presentation of the question of the authority of the attorneys to bring suit in the name of a party, because of a specific provision of the Code of 1873, under the provisions of which this proceeding was commenced and tried. Section 214 of that Code is as follows: “The court may, on motion for either party and on the showing of reasonable grounds therefor, require the attorney for the adverse party or for any one of the several adverse parties, to produce, or prove by his own oath or otherwise, the authority under which he appears, and, until he does so, may stay all proceedings by him on behalf of the parties for whom he assumes to appear.” We think this statute is designed as the exclusive method of testing the authority of attorneys to

appear in behalf of clients. It is also to be said that the attorney general afterwards appeared in the case, and is now of counsel for state.

II. The following are provisions of chapter 188, Laws Seventeenth General Assembly: "The owner or owners of any dam or obstruction across any river or stream, pond, lake or water course in this state, shall, within a reasonable time, erect, construct and maintain, over or across said dam or obstruction, a fishway of suitable capacity and facility to afford a free passage for fish up and down through said water course when the water of said stream is running over the dam." "Any dam or obstruction mentioned in section 1 of this act, not provided with such a fishway within a reasonable time after the taking effect of this act, is hereby declared a nuisance, and may be abated accordingly."

3 It is said by appellee that the defendant and his grantors have owned the land and maintained the dam for more than twenty-three years, and that the act above quoted is unconstitutional, in that it deprives the defendant of his property without due process of law, and also because private property is taken for public use without just compensation. The question of the constitutionality of such laws is not a new one in this country. It may be conceded that the authorities on the question are not without conflict. Whether or not the law contravenes either provision of the constitution depends on whether the acquisition of rights by the purchase of the land and the erection of the dam was without a reservation by the public to legislate in respect to the preservation of fish by the passage of such a law. The rights of the riparian owner on unnavigable streams is a subject that has been much considered by the courts, and in some respects the conclusions are harmonious, such as to the use of the water, and the exclusive right to take fish from the stream on his own land; it being the law that such an owner, if owning on both sides, has title to the banks and the bed of the stream, and, if the



stream is the boundary, then to the center thread of the stream. It is well-settled law that one riparian owner has not the right to so use the stream as to unreasonably deprive other riparian owners of rights common to all. It has ever been the law that riparian owners, when taking title from the public, do so with limitations in the public interests. They do not own the stream, but, by virtue of ownership of the soil, have the right to use the water passing over or through it, with limitations on such use. These limitations are to protect what have always been regarded as public rights or interests. Streams flowing through the country are not alone the heritage of riparian owners. They pass over and along our public highways, and through our cities and towns where the general public have access to them, and have rights in relation thereto that no one would think of questioning. These rights so pertain to the public health, convenience, and comfort, that the cause of their loss by personal interference would amount to a public nuisance. Fish and game are so related to the public welfare that they have, time out of mind, been the subjects of legal control, and their preservation has been very generally a matter of legislative concern. Chapter 15 of title 12 of our present Code is a practical illustration of legislative thought on the subjects of fish and game,—as to the public interest therein and their utility. The laws, if enforced, are a manifest abridgment of otherwise legal rights of the owners of the soil in taking fish and game thereon, and, except perhaps as to specific details, they meet with universal approval. These considerations are valuable in considering the inherent right of the owner of the soil to so use it as to impair such a public interest. In *Com. v. Essex Co.*, 13 Gray, 249, Chief Justice Shaw used this language: "It seems to be well settled that the obstruction of the passage of the annual migratory fish through the waters and streams of the commonwealth is not an indictable offense at common law; but the right to have these fish pass up the rivers and streams, to the head waters

thereof, is a public right, and subject to regulation by the legislature." Because of the court from which it emanates, we copy from an opinion by the supreme court of the *United States in Holyoke Co. v. Lyman*, 15 Wall. 500, as follows: "Rivers though not navigable even for boats or rafts, and even smaller streams of water, may be, and often are, regarded as public rights, subject to legislative control, as the means for creating power for operating mills and machinery, or as the source for furnishing a valuable supply of fish, suitable for food and sustenance. Such water power is everywhere regarded as a public right, and fisheries of the kind, even in waters not navigable, are also so far public rights that the legislature of the state may ordain and establish regulations to prevent obstructions to the passage of the fish, and to promote the usual and uninterrupted enjoyment of the right by the riparian owners. Proprietors of the kind, if they own both banks of the water course, and the whole soil over which the water of the stream flows, may erect dams extending from bank to bank to create power to operate mills and machinery, subject to certain limitations and conditions, and may also claim the exclusive right of fishery within their territorial limits, subject to such regulations as the legislature may from time to time ordain and establish. Persons owning the whole of the soil constituting the bed and banks of the stream are entitled to the whole use and profits of the water opposite their land, whether the water is used as power to operate mills and machinery or as a fishery, subject to the implied conditions that they shall so use their own right as not to injure the concomitant right of another riparian owner, and to such regulations as the legislature of the state shall prescribe." In *Weller v. Snover*, 42 N. J. Law, 341, the same quotation is made from Chief Justice Shaw, and the case of *Holyoke v. Lyman* is cited, and the syllabus states, "The state has the right, by legislation, to protect fish in rivers and streams not navigable." As early as 1808 the supreme court of Massachusetts announced

the law that: "Every owner of a water mill or dam holds it on the condition, or perhaps under the limitation, that a sufficient and reasonable passageway shall be allowed for the fish. The limitation, being for the benefit of the public, is not extinguished by any inattention or neglect in compelling the owner to comply with it." *Inhabitants of Stoughton v. Baker*, 4 Mass. 522. The case of *Parker v. People*, 111 Ill. 581, is a somewhat full consideration of the question, with an elaborate dissenting opinion by one of the justices; so that the case may be said to have received careful consideration. The statute of that state is so nearly like ours as to make the case entirely applicable. In that case the unconstitutionality of the law was urged upon the same grounds as in this case. The case has a somewhat more extended quotation from *Inhabitants of Stoughton v. Baker* than we have made, and gives full sanction to the rule, upon a review of the English as well as the American authorities. In 1822, in *Hooker v. Cummings*, 20 Johns. 90, the supreme court of New York said, "The legislature have confessedly the right of regulating the taking of fish in private rivers, and do every year pass laws for that purpose, as to rivers not navigable in any sense, and which are unquestionably private property." The state of Nebraska has a like law, and the question of its constitutionality arose in *West Point Water-Power & Land-Imp. Co. v. State*, 49 Neb. 218 (66 N. W. Rep. 6), and its validity was sustained, with a citation to the above authority and others. It should be said that the latter case, as authority, is questioned, because on rehearing the case was reversed, while on the first hearing it was affirmed. This is to be said of the case: On the hearing the case was reversed, and the law held unconstitutional, because of a noncompliance with the constitutional requirement as to what should be expressed in the title of the act, which question was not presented on the former hearing. Both opinions are published in the official report, and there is no reconsideration of the questions determined on the

first hearing. We are unwilling to believe the court would permit the case to be reported as it is, had there ever been a serious doubt of the correctness of its conclusions on the first hearing; so that, whatever may be the status of the case as to the conclusiveness of the holdings, it is evidently an expression of the judgment of the court on the questions considered. In this same connection we may further say that some of the cases we have cited—such as *Holyoke Co. v. Lyman*, *West Point Water-Power & Land-Imp. Co. v. State*, and others—are thought to be without force, because the dams were across navigable streams. It is true that they were; the erection of the dams being under a grant by the state, with no reservation in behalf of the public as to fish-ways. The law seems to be as definitely settled in favor of the public, to protect fish, and provide for their passage along the streams, in unnavigable as in navigable waters. In both instances the power to regulate is based on public interests, and it is not easy to see wherein the public may not as well assert its reserved power for such a regulation where the title has passed to the banks and bed of the stream, without express reservation, as where there is an express grant for the construction of a dam across a stream without reservation. The limitation of rights or reservation of power arises by implication of law affecting the grant in either case. But, aside from this, the courts of the country, from its very highest, have regarded these cases as so akin in principle that, almost if not entirely without exception, their conclusions have been made to rest, in cases where the dam has been constructed or maintained by grant, upon the rules applicable as well to unnavigable streams. The cases are valuable as indicating the trend of legal thought on the subject, even if not authoritative in the way of adjudications,—in which view, however, we are not disposed to concur. Were we to hold the present law unconstitutional, so as to open the way for a riparian owner whose land is on both sides of a stream, or two abutting owners, to, by a dam or other

obstruction, prevent the passage of fish up the stream, and thus deprive other riparian owners and the public of privileges as ancient as civilized history, the way would be well opened for innovations and surprises as to rights long enjoyed and of undoubted security. The streams and lakes are the natural abiding places for the fish. In them they cast their spawn and multiply their species. They constitute an important and valuable article of diet for the rich and poor, and, with the ways open that nature has provided, they are accessible to both. If the lowest riparian owner of a stream may legally block the way of their migration, the consequences to result to thousands are not readily imaginable. The law that would permit it would be the entering wedge by which the few would profit at the expense of the many. Before we sanction such a rule, its existence should clearly appear.

III. It is urged that, because of the dam being constructed thirty years before the enactment of the law, defendant has a right to maintain it by prescription. The clear weight of authority is against such a right. The  
4 cases already cited are quite decisive of this question.

The strongest case we have noticed in support of appellee's claim is *Woolever v. Stewart*, 36 Ohio St. 146. It holds to the doctrine that as between riparian owners, the maintenance of the dam for twenty-one years, under certain conditions to make the holding adverse, a prescriptive right exists, that the legislature may not disturb. The holding is made to depend clearly on a rule that there is no implied limitation upon the owner of the soil as to his right to obstruct the passage of fish along the stream, in which respect the case stands opposed to what seems to us the clear weight of authority and of reason. In Maine, the supreme court, speaking to the question, said: "No individual can prescribe against this right which is held to belong to the public." *Cottrill v. Myrick*, 12 Me. 222. In *West Point Water-Power & Land-Imp. Co. v. State*, *supra*, it is said

“Regarding the plaintiffs in error’s reliance upon a prescription right to maintain its dam without making provision for the passage of fish, and upon the fact that the construction of the dam was authorized by the territorial legislature, it is sufficient that the reserve powers of the state, including the right to conserve and promote the public welfare at the expense of private interests, denominated the ‘police power,’ is inalienable, and cannot be surrendered or bartered away by the legislature.” This case involves no question of a surrender of such rights by the legislature, and we quote the language only as to its force upon such rights

being lost by prescription. The authorities make the  
5 police power of the state the basis of legislative authority to prescribe the regulations as to fish and its streams; and in *Stone v. Mississippi*, 101 U. S. 814, it is said that “all agree that the legislature cannot bargain away the police power of the state.” This being true, how could the legislature, beyond its power of retraction, exempt the dam owner from obligations to maintain passageways for fish, to the detriment of those conditions which it is the office of the police power of the state to conserve and protect? If this could not be, how could it be that a rule of prescription would operate to suspend such a power? It would

seem that all reason, if not all authority, is against  
6 such a rule. It is thought that it is not competent for the legislature to declare the dam a nuisance, and a reason given is because it is “not a nuisance.” The statement can only be of force by saying that a nuisance is legally so defined, upon other and higher authority, and that the legislature may not provide that such an obstruction against the public interests shall constitute a nuisance. Our understanding is that it is the province of the legislature to prescribe what shall constitute a nuisance, within the fundamental limitations upon its authority. One definition of a nuisance is the unlawful use of one’s own property, working an injury to a right of another or of the public, and pro-

ducing such inconvenience, discomfort, or hurt that the law will presume a consequent damage. Woods Nuisance, 1; 16 Am. & Eng. Enc. Law, 923. The legislature has kept itself within the settled rule, because that the act of obstructing the passage of fish, against individual and public interests, would raise a legal presumption of damage, is too clear a proposition to be debatable. We need not consider other questions, and the judgment will stand REVERSED.

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CITY OF CEDAR RAPIDS, Appellant, v. CEDAR RAPIDS & MARION CITY RAILWAY COMPANY.

**Highways: STREET RAILROADS: Bridges.** A bridge is not a part of a street, nor does the term "pave" apply to the reflooring of the bridge, within a municipal ordinance requiring a street railway company to pave the space between the rails on any street which may, at any time, be paved or be ordered to be paved, by the city council, where bridges are named several times in the ordinance as distinct from streets, avenues, and highways.

*Appeal from Linn District Court.*—HON. W. G. THOMPSON, Judge.

TUESDAY, MAY 16, 1899.

DEFENDANT'S demurrer to the plaintiff's petition was sustained; and, the plaintiff electing to stand upon the petition, and refusing to further plead, judgment was entered against it for costs, from which judgment it appeals.—*Affirmed.*

*Warren Harman* and *J. J. Powell* for appellant.

*Chas. A. Clark & Son* for appellee.

GIVEN, J.—I. The petition shows that the defendant corporation is operating a street-railway line upon designated streets, avenues, and bridges of the plaintiff city, under

an ordinance of said city conferring the right to do so, subject to the conditions imposed by said ordinance. One of the conditions is that said company shall, at its own cost and expense, keep in good repair that portion of such streets and highways as is now paved which is included between the rails over which the cars pass and one foot outside of the same on either side, but not between the two inside rails where a double track is used except for the distance of one foot on either side as aforesaid, and shall immediately, at its own cost and expense, pave the portion of the streets included between the rails on each track and one foot outside the same on either side on all streets and avenues which may at any time be paved or ordered to be paved by the city council, and the manner of laying such paving and the material used shall be in accordance with the specifications furnished by the city engineer of said city." The petition further shows that, at the time said railway was constructed on First Avenue bridge across Cedar river, said bridge was paved with plank and cedar blocks; that thereafter said paving became out of repair between the rails and one foot outside thereof; that defendant neglected and refused to keep the same in repair, though demanded and notified so to do; and that said city council passed a resolution requiring as follows: "That said bridge be repaved with oak plank three inches thick, laid diagonally on said bridge, and that said City Railway Company be given ten days in which to repave that portion of said First Avenue bridge between the rails and tracks and one foot outside of its tracks, as required by law to pave; and if said City Railway Company does not repave that portion of the bridge which it is required to pave within ten days from the date notice of this order is served on it, such repaving will be done by the city, and the cost thereof assessed as a special assessment against said Cedar Rapids & Marion City Railway Company, in accordance with the law and ordinances of said city." It was further resolved that, if the defendant did not, after ten days' notice, "repave



that portion of First Avenue bridge between its rails and tracks and one foot outside of its tracks," the board of public works should advertise and let the contract for such repairs to the lowest bidder; and that, the defendant refusing to make said repairs, said board let a contract for reflooring the bridge in accordance with said resolution, and the work was done at a cost of six thousand three hundred and forty-nine dollars, on account of which the city assessed the defendant nine hundred and forty-four dollars and thirty cents, and this action is to recover that sum, with interest. It is shown in the petition that the board of public works and the defendant "agree that they were unable to determine the duty of the defendant in the matter of repairing any part of the floor of the bridge, and they agreed not to enter into any consideration of that question, but to leave that to be decided by the courts." By the demurrer the defendant presents, among others, the question whether it is liable for any part of the cost of repairing of said bridge, as was ordered and made under said resolution; in other words, whether the repairs ordered and made are "paving" within the meaning of said ordinance.

II. The ordinance imposes upon the defendant company the duty of keeping in repair "such streets and highways as are now paved," and to "pave on all streets and avenues which may at any time be paved or ordered to be paved" the "portion of the streets included between the rails and one foot outside of the same." The repairs ordered and made were "that said bridge be repaved with oak plank three inches thick laid diagonally on said bridge." There are two obvious reasons why this demurrer was properly sustained, namely, that the bridge is no part of the streets, avenues, and highways, within the meaning of said ordinance, and that the duty to pave or to repair pavement in the streets, avenues, and highways does not include reflooring of the bridge with oak plank, as ordered in the resolution. It is true that for certain purposes, as for travel, bridges are made part of the streets, avenues and highway; but throughout the

statute and in this ordinance, and in common acceptation, they are recognized as different from that part of the streets, avenues, and highways which are made directly upon the earth's surface. Section 870 of the Code authorizes the board of public works to "take charge of \* \* \* all street improvements, sewers, \* \* \* bridges, \* \* \* and the entire erection \* \* \* thereof." If, for all purposes, bridges are to be regarded as part of the street, why have made special mention of bridges in this connection, and, if bridges are to be regarded as a part of the street or highway for all purposes, why have specially mentioned them as in section 2 of said ordinance? It is by said section that power is granted to operate the street railway "on the streets, avenues, and bridges." Bridges are named several times in the ordinance as distinct from streets, avenues, and highways. The term "pave," as applied to streets, avenues, and highways, refers to the laying of some hard substance upon the earth, so as to make a convenient surface for travel, and such is undoubtedly the sense in which the word is used in this ordinance. We do not think the ordinance can be fairly construed to apply to the reflooring of the bridge as ordered in said resolution. In view of our conclusion, it is unnecessary that we consider other questions discussed.—**AFFIRMED.**

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E. D. JANES v. J. S. OSBORNE *et al.*, J. B. JONES, Appellant,  
and KEITH FURNACE Co., Intervener.

**Mechanic's Lien.** Laws Sixteenth General Assembly, chapter 100 section 8, provides that every person who furnishes material or labor under a contract with the owner, agent, or contractor for a building shall have a lien upon the building and the land. Section 10 provides that the word "owner" shall include every person for whose benefit any building is erected. The owner of the land contracted with another to sell the land. The purchaser agreed to pay a part of the price on delivery of the deeds, and to secure the balance by a mortgage, to be junior to another mort-

gage to be placed thereon by the purchaser, not to exceed \$1,500, to secure funds with which to pay for improvements which he agreed to make. The purchaser did not make the first payment, but with the consent of the owner, made the improvements but did not negotiate the mortgage. *Held*, that persons furnishing material and labor in making such improvements are entitled to a lien on the premises to an amount not exceeding \$1,500.

**Liens: VENDOR AND PURCHASER.** A vendor is not entitled to a prior lien for the amount of the purchase price which was to have been paid in cash at the time of the contract, but which was never paid, over a mechanic's lien for labor and material furnished in  
3 the erection of a house thereon by the purchaser under such circumstances as to make the lien attach to the land as well as to the building, where the contract shows that the vendor did not intend to reserve any lien for such amount, but expressly gave the cost of the house priority to his claim for purchase money.

**BUILDINGS: Owners.** Provisions of laws, Sixteenth General Assembly, chapter 100, section 10, that every person for whose immediate use or benefit any building, erection, or other improvement, is made, having the capacity to contract, shall be included in the  
2 word "owner," is not a limitation upon section 3, giving a lien for labor or material furnished for any building or other improvement upon land by virtue of any contract with the owner; but extends the definition of the term "owner" so as to include persons who would not ordinarily be held to come within its meaning.

*Appeal from Polk District Court.*—HON. W. F. CONRAD,  
Judge.

TUESDAY, MAY 16, 1899.

ACTION in equity to establish and foreclose a mechanic's lien. From a decree in favor of plaintiff and other mechanic's lien claimants, who are made defendants and whose rights are asserted by cross petitions, the defendant Jones, owner of the real estate, appeals.—*Affirmed*.

*Carr & Parker and Ira W. Anderson* for appellant.

*Read & Read, Phillips, Ryan & Ryan, C. C. & C. L. Nourse, J. K. Macomber, Dudley & Coffin, S. G. Van Auken, A. W. Miller, and Cummins, Hewitt & Wright* for appellees.

WATERMAN, J.—The case presents the question of the right of the mechanic's lien claimants to a lien upon the real estate. The defendant Jones, being the owner of the real estate, entered into a written contract with one Osborne as follows: "This agreement, made this 27th day of April, 1895, by and between J. B. Jones, of the one part, and J. S. Osborne, of the other part, witnesseth that said Jones has agreed to sell to the said Osborne lot 16, in block 1, Layman's addition to the city of Des Moines, for the sum of nine hundred dollars, payable as follows: three hundred dollars on delivery of deed for said lot, and the payment in monthly payments of ten dollars each, payable on the 1st day of each month, with annual interest on all sums unpaid at the rate of seven and a half per cent., and interest to be paid on such monthly payments as the same becomes due, said unpaid balance to be secured by mortgage on said lot, which shall be junior to a mortgage, not to exceed one thousand five hundred dollars, to be placed thereon by said Osborne, being a five-year loan. Said second party agrees to build an eight-room house of first-class material and workmanship in every particular, and modern in its style, the same to be supplied with furnace, mantle, bathroom, and to be completed within sixty days." Osborne did not make the cash pay-  
1      ment of three hundred dollars, nor did he mortgage the lot to raise the sum of one thousand five hundred dollars, but he did prepare plans for a house such as was provided for in the contract, submitted them to Jones, by whom they were approved, and then proceeded to have such house erected. The claims for mechanics' liens are for the labor and material supplied in the erection of the building, and the court below allowed such liens against the real estate to the amount of one thousand five hundred dollars, as against Jones. The contention of the latter is that, while the claimants are entitled to liens on the building, they are not to liens upon the real estate, and that, in any event, he should have had a prior lien on the land for the three hundred dol-

lars cash payment provided for in the contract, but which was never made.

Section 3, chapter 100 Laws Sixteenth General Assembly, is, in its material parts, as follows: "Every mechanic or other person who shall do any labor upon or furnish any material for any building \* \* \* or other improvement upon land, by virtue of any contract with the owner, his agent, trustee, contractor or subcontractor, shall have \* \* \* a lien upon such building, erection or other improvement and upon the land belonging to such owner on which the same is situated, to secure the payment of such labor," etc. Section 10 of the same act is in these words: "Every person for whose immediate use or benefit any building, erection or other improvements is made, having the capacity to contract, including guardians of minors or other persons, shall be included in the word 'owner.'" In

2       our opinion, this last section is not a limitation upon the first one quoted, but is intended to extend the definition of the term "owner" so as to include persons who would not ordinarily be held to come within its meaning. Section 4 of the act mentioned provides that "the entire land upon which such building, erection or other improvement is situated, including that portion of the same not covered therewith, shall be subject to all liens created by the chapter to the extent of all the right, title, and interest owned therein by the owner thereof, for whose immediate use such labor was done or things furnished," etc. Under these provisions appellant claims that Osborne was an "owner;" that his interest, which was an equitable one only, was all that could be subjected to the liens; and that the legal title or interest of Jones cannot be affected thereby. We think this construction leaves out of consideration one important provision of the contract

3       between Jones and Osborne. If Osborne had mortgaged the premises for the sum of one thousand five hundred dollars, and used the money so realized in

building the house, it seems manifest that under the contract such incumbrance would have taken precedence of any claim or lien of Jones, the vendor. This was the express agreement. If the cost of the building, up to the amount of one thousand five hundred dollars, would in that form have been a first lien, we can see no reason why it should not be so treated when asserted, as here, by the mechanics. The purpose of this agreement was to induce and aid Osborne to add to the value of the real estate purchased, and this he has done. The security which the vendor agreed to take is that which the trial court awarded him,—a lien upon the real estate, subject to the cost of the improvements or betterments. It appears to us that, under this contract, Osborne acted as the agent of the vendor, in a certain sense, in building the house.

Appellant combats this idea, and insists that the trial court did not so find, for it gave no personal judgment against Jones to the mechanic's lien claimants; but we have held that one may be an agent of the owner, to an extent sufficient to bind the real estate for improvements thereon, though his acts may not render the owner personally liable. *Willverding v. Offineer*, 87 Iowa, 478; *Miller v. Hollingsworth*, 36 Iowa, 163. Under the statutes referred to, the land is bound for the cost of the improvements when the contract therefor is made with the "owner, his agent," etc. In the case at bar Jones not only authorized, but required, Osborne to make this improvement upon the land. He knew the work was being done as it progressed, and he knew that, in order to pay for it, Osborne would have to give a first lien on the lot, for he expressly sanctioned such a lien. The facts bring this case clearly within the rule announced in the two cases cited above. Appellant relies upon the case of *Pinkerton v. Le Beau*, 3 S. D. 440 (54 N. W. Rep. 97), decided under a statute similar to ours. But in that case the owner did not agree that the cost of the building should take precedence of his claim for the purchase price. The effect of such an agree-

ment is to pledge the land to pay for the improvement. So far as appears in the *Le Beau Case*, the vendor expected the vendee to pay for the building from another source than the land, and this distinction we take to be material. It is this feature of the present case which distinguishes it also from *Logan v. Taylor*, 20 Iowa, 297; *Stockwell v. Carpenter*, 27 Iowa, 119, and similar decisions of this court. We need not consider other cases cited. This action is ruled by those to which we have called attention.

II. Appellant insists that, in any event, he should have been allowed a prior lien for the three hundred dollar payment, which was to have been in cash, but which was never made. An inspection of the contract will disclose that the vendor did not intend to reserve any lien for this amount. He expressly gives the cost of the house priority to his claim for purchase money.

III. The conclusion we reach on the questions stated permits us to pass without consideration appellees' objections to the record. The decree of the district court being in all respects correct, it is **AFFIRMED**.

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J. C. NORDYKE V. CHARLTON & STALKER *et al.*, Defendants,  
and JAMES SINGLETON *et al.*, Interveners,  
Appellants.

**Attachment:** MANUAL TAKING: *Promissory notes*. Code 1873, section 2967, subdivision 2, provides that, if property which it is sought to attach is capable of manual delivery, the sheriff must take it into his custody. Subdivision 4 provides that debts due defendant are attached by garnishment thereof. Section 2990 provides that the garnishee shall not be made liable on a debt due by negotiable paper, unless such paper is delivered or he is indemnified from all liability thereon after satisfying the judgment. Section 3046 allows execution to be levied on things in action. Section 45, subdivision 9, 10, provides the words "personal property" shall include evidences of debt and things in action. *Held*, that promissory notes could be attached by taking manual possession.

*Appeal from Keokuk District Court.*—HON. BEN MCCOY,  
Judge.

TUESDAY, MAY 16, 1899.

ACTION aided by attachment to recover the amount due on a promissory note. The writ of attachment was levied on six promissory notes and other property, a receiver was appointed to take charge of the attached property, and judgment was rendered in favor of the plaintiff for the amount due on the notes. Thereafter twenty-two persons intervened, claiming liens on the attached property by virtue of attachments in their favor, and their liens and that of the plaintiff were adjudged to be co-ordinate and equal. Two years later A. Anderson, cashier, and J. H. Young, intervened, claiming rights to the six notes held by the receiver, paramount to those of the prior interveners. The district court found that the claims of the subsequent interveners were well founded, and ordered the receiver to surrender to them the notes in controversy. The prior interveners appeal.—*Reversed.*

*D. T. Stockman, C. H. Mackey, Hamilton & Donahoe,*  
and *C. M. Brown* for appellants.

*H. M. Eicher* for appellees.

ROBINSON, C. J.—This cause was tried in the district court on a stipulation as to the facts. From that it appears that when this action was commenced and when the proceedings involved in it were had, the makers of the notes in controversy resided in Hitchcock county, in the state of Nebraska. The defendant Charlton & Stalker is a partnership which is said to have conducted a bank at Richland, in this state, and was never located in Nebraska, nor did it ever transact business in that state. A. C. Charlton and Allen Stalker, who compose the firm and are defendants, never resided in Nebraska, but for many years have been



residents of this state. The defendants are indebted to the plaintiff and each of the prior interveners, and judgment has been rendered in favor of each claimant for the amount due him. The attachment in each of the twenty-three cases in this state was levied on the six notes which were owned by Stalker alone, and which were delivered to the sheriff, and held by virtue of the levies, until they were placed in the hands of the receiver. The defendants also owed to each of the subsequent interveners the amount of a promissory note held by him, and about the time the actions were commenced in this state each of the subsequent interveners instituted, in the district court of Hitchcock county, Nebraska, an action against the defendants, aided by attachment, and nearly four weeks after the attachments issued in this state were levied on the six notes in controversy the makers of the notes were garnished under the attachments issued in Nebraska. The district court adjudged, in effect, that the garnishments in Nebraska created rights superior to those acquired by the levies made in this state.

Section 2967 of the Code of 1873 contains the following: "Stock or interest owned by the defendant in any company, and also debts due him, or property of his held by third persons, may be attached, and the mode of attachment must be as follows: (1) By giving the defendant in the action, if found within the county, and also the person occupying or in possession of the property, if it be in the hands of a third person, notice of attachment. (2) If the property is capable of manual delivery, the sheriff must take it into his custody if it can be found. \* \* \* (4) Debts due the defendant, or property of his held by third persons, and which cannot be found, or the title to which is doubtful, are attached by garnishment thereof."

It is claimed by the appellants that the second subdivision of the section quoted, which requires the sheriff to take into his custody property capable of manual delivery which can be found, applies to the attachment of promissory

notes; while the appellees contend that the fourth subdivision, which provides for the attachment of debts by garnishment, alone applies. The word "property" includes both real and personal, and the words "personal property" include money, goods, chattels, evidence of debt, and things in action. Code 1873, section 45, subdivisions 9, 10. Promissory notes are evidences of debts, and things in action are therefore personal property, within the meaning of the statute. *Allison v. King*, 21 Iowa, 302. See, also, *Callanan v. Brown*, 31 Iowa, 333; *State v. Orwig*, 24 Iowa, 102; *State v. Patty*, 97 Iowa, 373. It is said in 1 Shinn Attachment, section 208, that "a bond, a promissory note, or any other instrument for the payment of money may be attached by taking the same into the actual custody of the officer, or the same result may be obtained by summoning the maker as garnishee." See, also, 2 Wade Attachments, section 458; *Anthony v. Wood*, 96 N. Y. 181; *Pelham v. Rose*, 9 Wall. 103; *Caldwell v. Sibley*, 3 Minn. 406 (Gil. 300). It is also said that "evidences of indebtedness are only susceptible of a valid levy by being reduced to the manual possession of the sheriff. If they are in the hands of a third person, who cannot or will not deliver them up, he must be cited as garnishee." 1 Shinn Attachment, section 209. It is true, as claimed by the appellees, that the seizure of property by attachment, whether by a direct levy or by garnishment, is regulated by statute, and that the determination of the questions in issue depends upon the proper interpretation of the statutes of this state. Section 3046 of the Code of 1873 provides that execution may be levied upon bank bills and other things in action. It is the general policy of the law to permit property which may be taken on execution to be held by attachment. Since promissory notes are things in action, and could have been taken and sold under execution, there could have been no reason, unless found in the absence of a statute, for not permitting them to be taken under a writ of attachment where manual possession of them could have been obtained by the officer

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who executed the writ. But, as we have seen, section 2967 of the Code of 1873 required the sheriff, in serving a writ of attachment, to take into his custody property capable of manual delivery. Promissory notes are property and are capable of manual delivery. Therefore, unless subdivision 2 of the section cited is modified or limited by subdivision 4, there can be no question that an authorized and proper method of attaching promissory notes was for the officer to take them into his actual possession. Subdivision 4 does not state that debts due are attachable by garnishment only. In some cases garnishment is the only method by which debts can be attached, and that is true even though they are evidenced by promissory notes, as in cases where the officer cannot obtain possession of the notes. Section 2990 of the Code of 1873 provides that a garnishee "shall not be made liable on a debt due by negotiable paper, unless such paper is delivered, or the garnishee completely exonerated or indemnified from all liability thereon after he may have satisfied the judgment." It is the general rule that an indorsee for value before maturity, of a negotiable promissory note, takes it free from any previous garnishment of which he did not have notice. Rood Garnishment, section 133. This court held in *Hughes v. Monty*, 24 Iowa, 499, that section 2990 applies to indorsers of a negotiable promissory note which is past due. If subdivision 4 alone provided a means of attaching a debt evidenced by a promissory note, it is clear that the attachment of such a debt might have been defeated, at least when the note was negotiable and not due, by a transfer to an innocent purchaser, even though the officer serving the writ had the power to take actual possession of the note, and thus secure the debt for the payment of any judgment which should be obtained against the attachment debtor. To hold that an attachment could have been defeated in that manner would defeat the general policy and object of the statute which provided for attachments. It is true a negotiable promissory note is evidence of a debt which the maker owes,

but it is also evidence that the rightful holder is the owner of the amount represented by the note, and a legal transfer of the note transfers the title to the debt. The note is of substantial value, and is property. We are of the opinion that subdivision 4 did not modify or limit subdivision 2; that, in case of promissory notes, they authorized two methods of attachment,—one, by taking actual possession of the notes, where that could have been done; the other, by garnishment. This interpretation is authorized by the terms of the statute; it tends to harmonize the various provisions of the Code of 1873 in regard to attachments, and to effectuate the legislative intent. In this case it is shown that the attachments in Iowa were made, and possession of the notes in controversy taken by the sheriff several weeks before the garnishments were effected in Nebraska. Some of the notes were and some were not then due, but the time at which any of them matured is not material, for the reason that the garnishments did not create any interest paramount to the liens of the attachments which have been previously made. *Harvey v. Railway Co.*, 50 Minn. 405 (52 N. W. Rep. 905). See, also, *Manufacturing Co. v. Lang*, 127 Mo. Sup. 242 (29 S. W. Rep. 1010). We conclude that the district court erred in requiring the receiver to deliver the notes in controversy to the subsequent interveners. We find it is unnecessary to determine other questions discussed in argument. For the errors pointed out the judgment of the district court is REVERSED.

DEEMER, J., dissenting.

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H. SWANSON V. R. H. ALLEN, Appellant.

**Breach of Warranty: EVIDENCE.** Where the defense to an action for the breach of a warranty of a machine was that its failure to do

3 the work warranted was due to the incompetence of the operator, evidence that a year after the purchaser had abandoned it, while in the same condition as when the purchaser had it, and operated by others, the work done by it fulfilled the warranty, is admissible.

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**EXCLUSION: *Presumption.*** The presumption being that evidence offered by a party will be favorable to him, error in excluding it  
4 is not waived by failing to make a showing as to what it is proposed to prove, where the character of the answers is evident from the nature of the questions.

**Instructions: SETTING OUT PLEADINGS.** It is error to copy the pleadings into the instructions, and read them to the jury in lieu of a  
1 concise statement of the issues, where they are obscure, so that the jury is unable to comprehend the issues therefrom. The practice should never be tolerated, unless an absence of prejudice is manifest.

**CONSTRUCTING TOGETHER.** It is error to charge that all the instructions, and not any one of them, contain the law, because, while a single  
2 instruction may not contain all the law applicable to the entire case, it may contain all the law applicable to one phase of it, or to a given state of facts.

*Appeal from Sac District Court.*—HON. S. M. ELWOOD,  
Judge.

TUESDAY, MAY 16, 1899.

On the twenty-second day of June, 1896, the plaintiff executed a written order to the Aultman Company, of Ohio, to deliver to him a complete threshing outfit through its agent, R. H. Allen, at Early, Iowa, accompanied by a specific written warranty. At that time Allen had on hand a sample threshing outfit of the same company, differing from the one ordered in having a narrower belt, a telescope weigher, instead of a wagon elevator, and a jacket on the boiler. The machinery not coming, about July 15th the parties arranged that the plaintiff should take the sample outfit, the loader to be substituted for the weigher, and a wider belt to be furnished. In payment, a Case machine was turned in by Swanson at six hundred dollars, and six notes of two hundred and eighty-nine dollars and thirty-three cents each, payable at different dates, were executed by him to the Aultman Company, or R. H. Allen. The petition alleged in the first two counts the purchase of the outfit of the defendant on his oral warranty that it was of good material, and would do as good work and as much work in all kinds of grain as any

other of like size and capacity, and a breach thereof. In count 1 the plaintiff prayed for damages, but in count 2, in addition, averred the tender of the return of the outfit, and asked judgment for the value of the property paid, and the cancellation of the notes executed. Count 3 was like count 1, save that it alleged the personal warranty mentioned as an inducement to take the outfit, even though the property was bought of the company. The answer consisted of a general denial, and an averment that the sale was by a written order, and that the property was accepted by the plaintiff thereunder; and, in the counterclaim, recovery was claimed on three notes matured because of the nonpayment of interest. Trial to jury, verdict and judgment for the plaintiff, and the defendant appealed.—*Reversed*.

*Wright & Nugent* and *C. D. Goldsmith* for appellant.

*W. A. Helsell* and *R. M. Hunter* for appellee.

LADD, J.—Nothing is of greater importance in a jury trial than that the court shall make clear and certain to the jurors the very issues they are to determine. Ordinarily those required to serve are unaccustomed to the duties  
1      devolving upon them, and are likely to become confused by the mass of conflicting evidence and the illimitable arguments of counsel. The very purpose of instructing them is to make plain the issues they are to try, and the rules of law by which the evidence is to be examined and applied. *Pleasants v. Fant*, 22 Wall. 116; *Duthie v. Town of Washburn*, 87 Wis. 231 (58 N. W. Rep. 381). They should not be required to search the pleadings, even though copied into the instructions, for the controverted facts to be passed upon. It is often difficult for the experienced lawyer to fix upon the precise contentions of the parties, and there can never be any degree of certainty that jurors, without legal training, have been able to do so from an examination of the pleadings; besides, it is as much the duty of the judge to

extract the issues from the pleadings, and make them known and intelligible to the jurors, as it is their duty to pass upon them when this has been done. The practice of referring the jury to the pleadings has been condemned by this court. *Porter v. Knight*, 63 Iowa, 367; *Keatley v. Railway Co.*, 94 Iowa, 688; *Bryan v. Railway Co.*, 63 Iowa, 464. Also that of reading them as part of the charge. *Hall v. Carter*, 74 Iowa, 366. Copying the pleadings into the instructions as a statement of the issues is subject to the same criticism as the use of the originals, if the jury are permitted to take these upon retirement for deliberation. The only difference lies in their attachment as a preface to the other portion of the charge, and the use of the original separately. In *Gorman v. Railway Co.*, 78 Iowa, 518, so copying was disapproved, and in *Robinson & Co. v. Berkey*, 100 Iowa, 136, it was held erroneous. In *Hollis v. Insurance Co.*, 65 Iowa, 460, the issues were subsequently stated, the copies being treated as surplusage. In *Little v. McGuire*, 43 Iowa, 447; and *Crawford v. Nolan*, 72 Iowa, 673, it was held that, in view of the plain and unambiguous language of the pleadings, and the simplicity of the issues, stating them in the words of the pleader was without prejudice. The rule, then, deducible from these authorities is that the court must determine from an examination of the pleadings what the issues are, and so state them to the jury as to be readily comprehended, and that setting out the pleadings in lieu thereof will not be tolerated, unless manifestly without prejudice. We may add that such issues cannot be too clearly and explicitly stated, and that terseness and brevity will uniformly add emphasis.

In the case at bar, the pleadings, except an amendment and general denials, were copied as a statement of the issues, covering nine closely printed pages of the abstract, and constituted the first eleven instructions. As the petition was in three counts, and the counterclaim contained a like number, this involved unnecessary repetition, tending to confusion

and to the obscurity of the real differences between the several issues in controversy. They should have been made plain and accessible to the jury, in language comprehensible to those unlearned in the law, and free from vain repetition.

II. Exception is taken to the thirty-ninth paragraph of the charge: "In considering the instructions, consider them together, as they all, and not any one of them, contain the law by which you are to be guided." If "all" had been

inserted before "the law," we take it that appellant  
2 would have been content. The criticism is that the

jury are told no single instruction can be regarded as stating the law. One paragraph of the charge may contain the law applicable to a certain hypothesis in the case, or be controlling when applied to a given state of facts, if found to have been established, and by which the jury must be guided. This was true of several of those given. The fault of the instruction lies in apparently negating this rule. No one instruction may contain all the law applicable to the entire case, and for this reason all should be considered together in passing upon the issues. But this does not obviate the rule that one instruction may contain the law, as applied to some hypothesis or a given state of facts.

III. The threshing outfit was used by the plaintiff till near the close of the season of 1896, when he either tendered its return or abandoned it. The evidence in support of the petition tended to show that the machine, while operated by him, would not separate the grain from the straw, or clean it,  
nor thresh oats or barley well, and that it was worth-

3 less as a thresher. One of the defenses interposed was that any failure of the outfit to comply with the

alleged warranty resulted from the unskillful handling of Swanson. It was operated by others during the fall of 1897, and a witness testified that the outfit was in precisely the same condition, and was the same in every particular, as the year before. He and others saw it threshing oats and other grain at several places before the trial, and were interrogated



as to how it was doing the work. The ruling excluding this evidence sought to be elicited was erroneous. It tended directly to show that the outfit, if warranted, complied there with, and that the trouble with the machine the year  
 4 previous might have resulted from unskillful handling. No showing was required as to the character of the answers expected, as these were very evident from the questions. The appellant is entitled to the presumption that the evidence, if received, would have been favorable to the defense. Because of the errors pointed out, the judgment is REVERSED.

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RETURN U. SHUMWAY, Appellant, v. CITY OF BURLINGTON,  
 IOWA.

**Negligence: JURY QUESTION.** Whether or not a city was negligent in not anticipating and providing against the discharge of water upon a sloping sidewalk and its freezing there, is for the jury  
 1 upon evidence that for several years water had been discharged  
 4 upon the walk through a hole in a neighboring fence cut for that purpose and that, at the time of the accident, and for several hours before, the temperature was so low as to freeze water and that early the following morning there was a body of ice directly in front of the hole which was about three feet wide near the hole, narrowing to the outer edge of the walk, where it was six inches to one foot in width.

**EVIDENCE: Ordinances.** An ordinance prescribing the manner in which sidewalks shall be built, is admissible in an action against  
 2 the city for personal injuries for the purpose of showing that the walk in question was constructed in an improper manner.

**Appeal: ABSTRACTS.** The practice of merely stating in the abstract on appeal what the evidence tends to prove instead of setting  
 3 forth the evidence at length, is commendable where no question as to the sufficiency of the evidence to sustain the verdict for judgment is raised.

*Appeal from Des Moines District Court.*—HON. JAMES D. SMYTH, Judge.

WEDNESDAY, MAY 17, 1899.

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ACTION at law to recover for personal injuries alleged to have been caused by negligence on the part of the defendant. A jury was impaneled, and when the plaintiff had submitted his evidence the court directed a verdict for the defendant, and rendered judgment in its favor for costs. The plaintiff appeals.—*Reversed.*

*E. S. Huston* for appellant.

*George S. Tracey* for appellee.

ROBINSON, C. J.—The evidence tended to show the following: About 9 o'clock on the evening of March 3, 1897, the plaintiff, while exercising proper care and caution, fell on a sidewalk of the defendant, and received injuries for which he seeks to recover. Water had been for several years accumulated on adjacent premises, flowing thereon from a well or spring, and was discharged through a hole in a fence, cut for that purpose, over the walk at a place where the accident occurred. The walk was laid on a street curbed, guttered, paved and sewered with brick, and was made of boards twelve feet long and two inches thick, laid crosswise on stringers on the surface of the ground. The walk sloped towards the center of the street, the side or edge next to the fence being ten inches higher than the other. There was also evidence which tended to show that such a walk would last for from six to eight years, when it would have to be renewed. After submitting the evidence referred to, the plaintiff offered in evidence an ordinance of the defendant adopted in March, 1887, which contains the following: "No person shall lay or cause to be laid any sidewalk on any street which has been macadamized, curbed, and guttered, unless the same shall conform to the established grade of the street so improved; the outer edge of the walk so laid shall not be more than six inches above the top of the curbstone, and shall have a descent from the line of the lot

towards the street of three inches,—without obtaining permission from the city council.” The court sustained an objection to the ordinance, and it was not introduced. The plaintiff also submitted evidence which tended to show that at the time of the accident, and for several hours before it occurred, the temperature was so cold as to freeze water, and that early in the following morning there was a body of ice directly in front of the hole in the fence, which was about three feet wide near the hole, narrowing to the outer edge of the walk, where it was from six inches to one foot in width. The ice was thickest in the middle, and sloped to a thin edge on each side. The plaintiff did not show that any one saw ice at about the time of the accident at the place where he fell.

I. The plaintiff complains of the ruling of the court which excluded the ordinance. The evidence which had been admitted when that was offered tended to show that it was adopted before the walk was built. The ordinance was offered in evidence as tending to show that the walk was not constructed in a proper manner. It was the duty of the defendant to require that the public sidewalks within its limits be so constructed as not to expose people who should use them to unnecessary dangers. In the exercise of the power  
2 conferred upon it, the ordinance was adopted, and we are of the opinion that it was admissible as evidence tending to show negligence on the part of the defendant. *Smith v. City of Pella*, 86 Iowa, 236. Considered alone, it might have been of but little value; but, taken with other evidence, it might have been sufficient to show that the defendant was negligent in permitting the walk to be in the condition described, at the time of the accident.

II. The abstract does not purport to contain all of the evidence submitted, but states what it tended to prove. That is authorized and commendable practice in cases in which  
3 this court is not required to determine the sufficiency of the evidence to sustain a verdict or judgment. *Kel-leher v. City of Keokuk*, 60 Iowa, 473; *Weitz v. Des*

*Moines Independent Dist.*, 79 Iowa, 423; *Forcum v. Montezuma Independent Dist.*, 99 Iowa, 435. The appellee does not deny the averments of the abstract in regard to what the evidence tended to prove, and we have before us all that is needed to determine the questions presented.

III. There was no direct evidence to the effect that the plaintiff fell in consequence of water or ice on the walk, but he fell while in the exercise of proper care; and the evidence tended to show that there must have been water or ice, and probably the latter, on the walk at the place of the accident when it occurred. That the tendency of water or  
4 ice upon a sloping surface is to make it an uncertain and dangerous way for pedestrians is a matter of common knowledge. It is said that a municipal corporation is not liable for injuries caused by the freezing of water in a night, because negligence cannot be imputed to it unless it has had notice a sufficient length of time to enable it to remedy the defect. But the evidence in this case tended to show that water from adjacent premises had been discharged through a hole in the fence, over the walk, for so long a time that the defendant should be charged with knowledge of it. The effect of a freezing temperature upon water flowing onto a sidewalk, and the dangers to be apprehended from ice on a sloping walk, were, it must be presumed, known to the defendant. Whether, under all the circumstances disclosed by the evidence, it was negligent in not anticipating the dangerous condition of the walk, and providing against it, was a question for the determination of the jury. *Ford v. City of Des Moines*, 106 Iowa, 94; *Haskell v. City of Des Moines*, 74 Iowa, 110; *Gillrie v. City of Lockport*, 122 N. Y. App. 403 (25 N. E. Rep. 357); *Todd v. City of Troy*, 61 N. Y. 506; *Com. v. Kendrick*, 147 Mass. 444 (18 N. E. Rep. 230), and cases therein cited.

We are of the opinion that, if the ordinance rejected had been received in evidence, the jury would have been authorized to find for the plaintiff. For the errors in rejecting the

ordinance and in directing a verdict for the defendant, the judgment of the district court is REVERSED.

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**JAMES C. DEVIN v. CHARLES WALSH, Appellant.**

**Joinder on Causes.** A cause of action for value of coal taken from 1-3 land may be joined with one for damages to the land.

**ACTION ON CONTRACT.** Where an owner of land sues to recover for coal taken therefrom by another and for damages, thereto, and  
2 the jury find separately the value of the coal and the amount of damages, the judgment, to the extent of the former, is on contract and not on tort.

*Appeal from Wapello District Court.*—HON. M. A. ROBERTS,  
Judge.

WEDNESDAY, MAY 17, 1899.

ACTION at law to recover on a judgment against the Hawkeye Coal Mining Company, it being alleged that the defendant is a stockholder in said company, and that his shares are not fully paid. There was a demurrer to the answer, which was sustained. Defendant electing to stand upon his answer, judgment was rendered against him. He appeals.—*Affirmed.*

*Mitchell & Hunter* for appellant.

*W. S. Coen* for appellee.

**WATERMAN, J.**—The amount involved being less than one hundred dollars, the appeal was duly certified, as provided in section 4110 of the Code. The answer of defendant sets up the claim that the judgment against the corporation was founded not upon a debt, but upon a tort. Copies of the pleadings, instructions, and verdict in the action against the corporation are attached as exhibits to the answer. The question discussed by appellant, and which he insists is the only

one involved, is whether a stockholder can be made liable, under section 1632 of the Code, on a judgment rendered against the corporation for a tort, pure and simple. We do not agree with counsel that this question is presented. A statement of our reasons for this conclusion will necessarily involve an examination of the issues in the action which resulted in the judgment against the corporation.

The petition, as first filed, claimed that the Hawkeye Coal Mining Company had taken forcible possession of the coal underneath the surface of plaintiff's land; that it had opened mines to his damage, and had mined and carried away a large amount of coal; and that these acts were done intentionally, wantonly, and against plaintiff's will. He

1     prayed judgment for rent and royalty, for injuries to the land, and for exemplary damages. By an amendment, plaintiff claimed, further, for coal taken both before and after the date of filing the original petition, at the price of one and three-fourths cents per bushel at the mouth of the pit, and he also asked a large sum on account of "wanton aggression." There were several other amendments to the petition, which, with a single exception, we need not notice. Plaintiff finally withdrew his claim for exemplary damages, but expressly retained that for coal taken and for injuries to the real estate. Under appropriate instructions, the case was sent to the jury, which returned a verdict in plaintiff's favor for one thousand two hundred and thirty-five dollars and thirty-five cents; and, in response to two special interrogatories submitted, stated that they allowed him for coal taken the sum of one thousand and one dollars and thirty-five cents, and for damages to the realty two hundred and thirty-four dollars. Upon these findings the

2     judgment was rendered. So far as the claim for coal taken is concerned, the action was upon an implied contract. In 2 Greenleaf Evidence, section 120, under the title "Assumpsit," it is said: "And where the defendant has tortiously taken plaintiff's property, and sold it, or, lawfully

possessed of it, has wrongfully sold it, the owner may ordinarily waive the tort, and recover the proceeds under this count." This principle is recognized in *Warner v. Cammack*, 37 Iowa, 642, where the following language is used: "Wherever a party has derived a pecuniary advantage from a wrong done by him, and it is competent for the person suing thereon to waive the tort and maintain his action upon the promise implied by law, there the obligation to pay is a debt; and this, regardless of the form of action in which the obligation is sought to be enforced." The illegal entry upon the real estate, and the breaking down of the coal from the walls of the mine, was a tort, for which a recovery could not be had in assumpsit; but the taking away of the coal thereafter was a conversion of personal property, for  
 3        which an action *ex contractu* would lie. It was proper, under our practice, for plaintiff to join in one action his claims on tort and contract. *Turner v. Bank*, 26 Iowa, 562. To the extent of the value of the coal taken, plaintiff's judgment against the corporation is founded upon contract. The judgment of the district court must be AFFIRMED.

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A. B. BYRAM, Appellant, v. SOVEREIGN CAMP OF THE WOOD-  
 MEN OF THE WORLD.

**Benefit Associations: EXPULSION: Jurisdiction.** Where the by-laws of a benefit association prescribe the method for expulsion of  
 1 members, and provide that charges in writing shall be preferred  
 2 and served on accused, an expulsion by a vote of the order, on a motion merely, is void, since the association can expel a member only as the by-laws prescribe.

**SAME.** The preferment of charges and a notice thereof and of the time and place of trial which are prescribed by the by-laws of a  
 1 fraternal association, in case of an attempt to expel a member,  
 2 are jurisdictional and are not waived by the member's presence  
 3 when a motion is adopted for his expulsion, and his failure to object in any manner to the proceedings or jurisdiction of the

association to try him, except that he had restored the money which he is charged with having misappropriated and had taken back certain dues paid by him.

**SAME.** The presence of the member so expelled when the motion is 2-8 made is not an acquiescence in the proceedings, it being void.

**WAIVER BY APPEAL FROM LOCAL CAMP.** Where a member is expelled 4 from a benefit association, which acts without authority, his appeal to the Sovereign Commander, who affirms the action of the camp, does not make effectual his expulsion, since he must exhaust all remedies afforded by the association before he can resort to the courts.

**SAME.** A by-law of a fraternal association which provides for an appeal to the Sovereign Commander from the action of a local camp in expelling a member of a Sovereign Commandery and 5 that his decision shall be final unless reversed by the sovereign camp, does not contemplate an appeal from the Sovereign Commander to the sovereign camp, but the appeal to the Sovereign Commander takes the case in due course of procedure to the sovereign camp, where the Sovereign Commander is the chief executive officer of the sovereign camp, presides at its meetings, and is required by law to make reports of his transactions to each of its meetings.

**WAIVER: Failure to enforce reinstatement.** The beneficiary in a certificate issued by a beneficiary association, may maintain an action 7 thereon, notwithstanding that the association, during the member's life-time, undertook to expel him and he was not reinstated by mandamus or otherwise, where the expulsion was void for want of jurisdiction on the part of the association to entertain the expulsion proceedings.

**WAIVER OF DUES: Forfeiture.** In an action by a beneficiary against 6 a benefit association, defendant cannot defeat its liability by claiming a failure to pay an installment of dues, where the association had attempted his expulsion, and would not have received the dues.

**SUIT BY BENEFICIARY.** Where the by-laws of a benefit association 8 include the father among those whom a member may designate as his beneficiary, and a member designates his father, he is the proper party to sue for the benefit, although such member may leave a wife and child surviving.

*Appeal from Hamilton District Court.*—HON. D. R. HINDMAN, Judge.

WEDNESDAY, MAY 17, 1899.



ACTION on a beneficiary certificate issued by the defendant association. Judgment for defendant, and the plaintiff appealed.—*Reversed.*

*Geo. Wambach* for appellant.

*Brome & Burnett* for appellee.

GRANGER, J.—I. The plaintiff was the father, and is the beneficiary named in the certificate in suit issued by the defendant association to Elbert W. Byram on the tenth day of August, 1894. It secures to the beneficiary the sum of one thousand dollars at the death of Elbert W. Byram, on specified conditions. Elbert W. Byram, by due course of procedure, became a member of Lone Pine Camp, No. 85, at Diagonal, Iowa, and he died about September 4, 1896, and this action is to recover the amount of the certificate. The answer pleads expulsion, nonpayment of dues, and other matters that may be noticed in considering different questions. The facts are stipulated, except that as to some proofs exceptions were taken to their admission. It will be well to notice some facts bearing directly upon the question of the certificate being avoided because of the expulsion of Elbert W. Byram from the association. About February, 1896, Byram became a member of Lone Pine Camp No. 85, and was for a time thereafter clerk of the camp, and while such clerk he used five dollars and fifty cents of the funds in his hands. The purpose of its use is somewhat in dispute; it being his claim, at that time, that he used it for stamps, stationery, etc., for the camp, for which he expected the camp to allow him. The following facts appear upon the stipulation: "Verbal notice was given to said Elbert W. Byram by Ira G. Morrison, clerk of Lone Pine Camp, No. 85, three days prior to the eighteenth day of July, 1896, that at the regular meeting of said camp held on July 18, 1896, a motion would be made and entertained to expel him from the order on

account of his having theretofore appropriated the funds of the camp, and he was then and there requested by said Morrison to be present at said meeting and show cause, if any, why he should not be expelled. That no charge of any  
1 kind or charges were filed or preferred against the said Elbert W. Byram in writing, and that proceedings had upon such expulsion were had in the manner following, to-wit: On the eighteenth day of July, 1896, a regular meeting was had of said camp, and, the said Elbert W. Byram, being present, a motion was made and seconded that on account of and for the reason that Elbert W. Byram has heretofore, as found and reported by the board of managers, misappropriated the funds of the camp, to his own use, to the amount of five dollars and fifty cents, that he be expelled from the order. That while said motion was being discussed, and after the same had been made in the presence and hearing of said Elbert W. Byram, the said Elbert W. Byram became angry and left the meeting. Thereupon said motion was submitted to a vote of the members remaining present at such meeting, and was carried by unanimous vote of all members present; that no notice was given the members of the said local camp of the contemplated expulsion of the said Elbert W. Byram, and that not all the members were present at the meeting at which the motion was made." In pursuance of such action, official notice was at once given Byram of his expulsion, and that thereafter he would in no way be connected with the order. From such action Byram appealed to the sovereign commander, who sustained the action of the camp. Assessments and dues to the amount of two dollars and fifteen cents that had been paid by plaintiff, were returned to him July 23, 1896, because of such expulsion. A very important question is asked as to the legality of the expulsion. If valid, it concludes a right of recovery by plaintiff by the terms under which the certificate issued. It is not an open question that the membership of Elbert W. Byram in the association created contractual relations, so that  
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the rights and obligations of the parties are to be controlled thereby. By the terms of the certificate, the constitution, fundamental laws, and the by-laws of the association became a part of the contract of membership, and one express provision is that expulsion shall forfeit the certificate. This is not questioned. Appellant's position is that the laws of the association, being a part of the contract, prescribe the method of expulsion, and that it could not be effective on a mere motion, as was done in this case. The laws are in  
2 the record, and they make express provisions for procedure in cases of complaints, and among them it is provided that, upon information to warrant it, charges in writing shall be presented to the camp, and service of a copy thereof be made on the accused, and the details of investigation are quite definitely prescribed. It is expressly provided that after investigation a vote shall be taken upon the question, "Have the charges been sustained?" and a two-thirds vote is necessary to sustain them. If sustained, then the camp may impose the penalty, and among the penalties prescribed is that of expulsion by a two-thirds vote. The expulsion in this case was without any reference whatever to such a procedure, and without any charges or findings of guilt. A board of managers had reported a misappropriation of funds by him, nothing further appearing in regard thereto, and thereupon he is expelled on motion. Not a jurisdictional fact appears to justify the action of the camp, or the sovereign commander on appeal. That the preferment of charges, and a notice thereof, and of the time and place of trial, are jurisdictional facts, no one should even doubt. They were as much required of the association as a condition on which it had authority to act in the matter of expulsion, as was Byram required to pay his assessments and dues in order to be in good standing in the association. These duties as to both arose from the terms of the contract of membership. Appellee urges that the presence of Byram when the motion was adopted for his expulsion, and his acquiescence in such action

by receiving back the moneys paid by him on account and dues and assessments after a certain date; his not  
3 having objected in any manner to the proceedings, or the jurisdiction of the camp to try him, except that he made restitution of the money misappropriated, and his taking an appeal to the sovereign commander,—have waived all objection to the procedure and he stands legally expelled. It is true that Byram received a verbal notice from the clerk that a motion would be made at the regular meeting of the camp for his expulsion because of the misappropriation of funds, and for him to be present, and show cause why he should not be expelled. It was not a notice that he was under charges, or of the hearing, but, in so far as the notice conveyed any idea, it was that there had been such proceedings as that he was found guilty, and the camp would act on the question of his expulsion, and he might show cause against it. In *People v. Musical Mut. Protective Union*, 47 Hun. 273, where the by-laws required that charges should be preferred, a copy of which should be served on the member charged, and a notice was given, but no charges preferred, it was held that, in the absence of charges, a notice to appear and show cause why he should not be expelled gave no authority to expel him. It is said in the opinion: "Membership in this organization was attended with valuable rights and privileges, and the relator could not be deprived of them without a reasonably plain case being made against him, and specifications stating it, previously served upon him, allowing evidence to be taken to prove that case." In *Downing v. Society*, 10 Daly, 262, it is said: "It has been decided that, though a member attends and enters upon his defense, he does not waive his right to a notice of the charges." It cites *Marsh v. Huron College*, 27 Grant, Ch. 605; *Labouchere v. Earl of Wharncliffe*, 13 Ch. Div. 346; *Fisher v. Keane*, 11 Ch. Div. 353. In *Mulroy v. Supreme Lodge*, 28 Mo. App. 463, the court makes special reference to the contractual relations of the parties, and deals with the limitations on the society because

of such relations, and it is said: In a society such as this the members to whom benefit certificates are issued acquire property rights in the society of a very important character; and in dealing with these rights it is highly essential that the courts should confine themselves strictly to the terms of the contract which the members have made among themselves.

\* \* \* We hold in this case, as we have held in other cases of this kind, that the rights of the beneficiary in such a certificate are strictly a matter of contract; that this contract is to be found in the terms of the certificate itself, in the statutes of the society, and, in the case of a society incorporated under the law of this state, in the statutes of this state, relating to such societies." The case holds an expulsion invalid because not conformable to the contract as thus defined, the ground of expulsion not being one specified in the contract, and it is said the proceeding was without jurisdiction of the subject matter. It will thus be seen that in such proceedings by a society, to make its judgment valid, it must conform to its contract in the particulars essential to jurisdiction both of the person and subject matter, in the absence of which its proceedings are void. It would be difficult to imagine a clearer departure from jurisdictional requirements than in this case, the proceeding being without charges, without notice of charges, without trial, and without a finding of guilt in the way the association had obligated itself to do. The presence of Byram when the motion was made to expel him can in no way be construed into an acquiescence in such a proceeding. It appears that while the motion was being discussed he became angry and left the meeting. The cause of his anger is not shown, and we have no occasion for assumption in regard to it. It is sufficient to say that while, as to mere matters of irregularity in a proceeding in which the association was acting within the scope of its authority, the presence or acquiescence of the accused might excuse or waive what might otherwise be erroneous, such a rule never obtains in a proceeding void for want of authority to act.

II. From the action of the camp expelling him Byram appealed to the sovereign commander, who affirmed the action of the camp, and it is thought the taking of this appeal makes effectual his expulsion. We have seen no authority  
4 announcing such a rule, but, on the contrary, there is a line of authorities holding that, where the right of appeal exists, it must be exhausted before there can be a resort to the courts, on the theory that the member should first obtain redress, if it can be done, under the laws of the association. *Karcher v. Supreme Lodge*, 137 Mass. 368; *Lafond v. Deems*, 81 N. Y. 508; *Harrington v. Association*, 70 Ga. 340. Whether or not such a rule obtains in a case where the association acts wholly without authority, so that its proceeding is void, we need not determine, for an appeal was  
5 taken in this case. We may properly, in this connection, consider the claims of the appellee that the failure to appeal from the sovereign commander to the sovereign camp avoids plaintiff's right to complain of the action of the association in this action. We find no provision for such an appeal. Appellee refers to section 139 of the laws of the association, but it makes no provision for an appeal to the sovereign camp, but does provide for one from a camp to the sovereign commander. It is true that the section provides that the decision of the sovereign commander shall be final unless reversed by the sovereign camp, but we understand that the sovereign camp acts upon the decisions of the sovereign commander without an appeal; or, perhaps, in better terms, we understand the appeal to the sovereign commander to take the case in due course of procedure to the sovereign camp, because the sovereign commander is the chief executive officer of the sovereign camp, presides at its meetings, and is required by law to make reports of his transactions to each meeting of the sovereign camp. It is in this way that his decisions are brought before the sovereign camp for review, and not by a direct appeal. It is urged that Byram, on his appeal to the

sovereign commander, did not present the question of the irregularity of the proceedings, but merely urged his case on its merits, by a correspondence. However that may be, the sovereign commander did consider the question of the regularity of the proceedings, for he says: "I corresponded with the camp, and through its clerk, Sovereign Ira Morrison, was fully advised as to the proceedings in the case, which appear to be regular, and the evidence sufficient to justify expulsion." No one in this court contends, nor could they with reason, that there was even a semblance of regularity in the proceedings. On the contrary, the facts conclusively show an entire absence of regularity, and an absolute disregard of law. There was no charge, no notice of a charge, no evidence, and no findings of guilt; all of which are specifically provided for in the prescribed method of procedure. It seems certain that either the camp falsely presented the facts to the sovereign commander, or he has falsified them in his statement. The law seems to contemplate that the review by the sovereign commander of a case on appeal shall, or at least may, be on a written abstract of the record of the camp from which the appeal is taken, which the sovereign commander may require the clerk of the camp to send him; and one was required in this case. There does not seem to be any requirement that the accused who appeals must present objections to the record, or waive them, and especially where the proceedings are void for want of jurisdiction.

III. The expulsion was July 18, 1896, the approval thereof by the sovereign commander was August 27, 1896, and E. W. Byram died September 4, 1896. Prior to the expulsion, his dues and assessments had been paid for May, June, and July of that year, to the amount of two dollars and fifteen cents, which amount was, on July 23, returned to plaintiff because of the expulsion. By the laws of the association, the assessment for August, 1896, became due on the tenth of the month, and payment thereof was required, with-

out notice, of all members in good standing, and a failure of payment operated as a suspension so as to avoid the certificate. It is now urged that the failure to pay the August assessment is fatal to recovery. The record is a conclusive showing that at all times the plaintiff was  
6 willing and anxious to pay all dues required of members in good standing, and was urging the invalidity of the expulsion, both to the local camp and the sovereign commander; and the showing is just as conclusive that at all times after the attempted expulsion, the local camp and the sovereign commander were treating Byram as expelled, and would in no way recognize his right to pay assessments, or his connection with the association. All dues and assessments have been tendered in this case. In now urging a default in the payment of the August assessment, the association is in the attitude of saying: "We regarded you as expelled, with no right to pay dues, and you would, but could not, pay them, for we would not receive them; and yet, for not paying them, you have forfeited your membership." We have yet to learn that the law ever justified such a claim by any person or association. The unlawful and void proceedings in an attempt to expel Byram forced the situation resulting in the nonpayment of the assessment, and the persistence of the association in its unlawful course caused the default of which it now seeks to take advantage. To permit it would be to stifle the familiar legal maxim that no one should be permitted to take advantage of his own wrong.

IV. It is thought that, in view of the expulsion, plaintiff cannot maintain this suit, because there was no reinstatement, by mandamus or otherwise, of E. W.  
7 Byram, during his lifetime. The mistake is as to the facts. He was not expelled. The proceeding was void, and Byram was at all times a member in good standing. See authorities above cited.

V. E. W. Byram was a minor at the time of his death,—that is, under 21 years of age,—but had married, and



left, at his death, a wife then pregnant, and a child was there-  
 after born. It is now urged that, as he was a minor,  
 8 and a wife and child survived him, the designation of  
 his father as a beneficiary is void, on the theory that  
 the designation is of a testamentary character. The laws  
 of the association provide who may be beneficiaries of its  
 members, and within the limitation of the provision the mem-  
 ber may make the designation. A father is included among  
 those who may be designated. Our law then, as well as now,  
 provided who could become members of such an association in  
 respect to age, and only persons under the age of fifteen and  
 over the age of sixty-five years are excluded; and the same  
 law provides who may be beneficiaries of members therein,  
 and a father is included. Code, section 1824. There is  
 nothing to indicate that, as to members, all have not the same  
 authority as to designation of beneficiaries. It seems to be  
 the purpose of the law to invest persons fifteen years of age  
 with contractual authority for the purposes of such member-  
 ship, and to divest persons over sixty-five years of such  
 authority. In view of these provisions of the law, we regard  
 the plaintiff as the proper party in interest, and authorized to  
 maintain the suit. There should be a judgment for plaintiff,  
 and the cause is remanded therefor.—REVERSED.

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STATE OF IOWA V. FRANK Z. SMITH, Appellant.

**Adultery: WHO MAY PROSECUTE.** On the remarriage of husband and  
 wife after a divorce, the husband may institute a complaint  
 1 against a third person for adultery committed with the wife dur-  
 ing their former marriage, under Code, section 4932, providing  
 that prosecution for adultery shall be instituted only on the com-  
 plaint of the husband or wife.

**CONDONATION.** By re-marrying his first wife after being divorced  
 from her, with knowledge of adultery committed by her with a  
 2 third person during the former marriage, a husband does not con-

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done the offense of the third person, so as to bar a criminal prosecution against him.—Deemer, Justice dissenting.

**PROOF OF ACTS NOT CHARGED: Election** Since Code, sections 5164 and 5285, authorizes the state to show the commission of the crime at any time within eighteen months preceding the date alleged in the indictment, one convicted of adultery under an indictment charging one specific act on a day named, cannot complain on appeal that evidence of more than one act was received, where there was no proof of the commission of the offense on the day charged in the indictment, and it does not appear which of the several other acts proved was first shown, and no request for an election was made.

**APPEAL: Objection below** A defendant who desires that the state shall elect upon which of several acts it will rely for a conviction, should make such request before the cause is submitted to the jury and if he fails to do so, is not entitled to any relief on appeal, because the election was not made.

**PRIVATE COUNSEL FOR STATE.** An objection that attorneys interested in a civil action in which a recovery was asked on account of matters involved in the criminal prosecution, were permitted to assist in the criminal prosecution, contrary to Code, section 805, made for the first time on motion for a new trial after a conviction, is too late where it does not appear that the court knew of the disqualification of such attorneys, and where counsel for accused knew of it when the trial commenced.

**SAME.** A conviction of the crime of adultery will not be reversed because, in violation of Code, 805, attorneys who represented the defendant in a civil action between defendant and complainant, in which a recovery is asked upon matters involved in the criminal prosecution, assisted the attorney in the prosecution, where they were not guilty of any intentional wrong and the attorney for the defendant also represented him in the civil action and therefore was aware that they represented the complainant in the action.

*Appeal from Warren District Court.*—HON. A. W. WILKINSON, Judge.

WEDNESDAY, MAY 17, 1899.

THE defendant was convicted of the crime of adultery, and from the judgment, which required that he be imprisoned in the penitentiary at Fort Madison for a term of six months, he appeals.—*Affirmed.*

*Powell & Ross* and *H. McNeil* for appellant.

*Milton Remley*, Attorney General, and *W. H. Redman* for the State.

ROBINSON, C. J.—The indictment alleges that the defendant committed the crime of adultery with Mary Worthley, who was at the time the wife of Herbert Worthley.

I. Section 4932 of the Code relates to the crime of adultery, and provides that “no prosecution therefor can be commenced except on the complaint of the husband or wife.”

It is claimed that this prosecution was not commenced  
1 as required by that provision. The facts involved in the claim are as follows: During the months of October and November, 1897, Herbert Worthley and Mary Worthley were husband and wife, and lived together. At different times between the date specified in the indictment and the 7th day of the following month the defendant committed adultery with Mrs. Worthley. On a date not shown, but which was prior to the twenty-fourth day of December, 1897, Mr. and Mrs. Worthley separated, and on that day she commenced an action for divorce. It was granted on the fifth day of the next month, on the ground of cruel and inhuman treatment. On the twenty-fifth day of March, 1898, they again married each other, and immediately thereafter Worthley presented to the grand jury a complaint against the defendant, charging him with the offense of adultery committed with Mrs. Worthley in October and November, 1897, and demanding that the matter be investigated. Thereafter, and on the same day, the grand jury found and returned the indictment in this case. It is contended that, in consequence of the divorce, and the interval of time during which the marriage relation did not exist between Mr. and Mrs. Worthley, he must be considered in law as having no right to institute this prosecution that he would not have had in case he had first married his wife after the acts of

adultery were committed. The statute in question has been considered by this court in numerous cases. In *Bush v. Workman*, 64 Iowa, 206, it was said that it "forbids prosecutions for adultery except when commenced by the spouse of the person prosecuted." In *State v. Corliss*, 85 Iowa, 18, it was said to be "grounded in the regard which the law has for the marital relation, and the right of the husband and wife to condone the wrongs of either towards the other." In *State v. Bennett*, 31 Iowa, 24, it was said that it "leads to the inference that the offense is rather a crime against the partner to the marital relation than against society in general." In *State v. Roth*, 17 Iowa, 336, it was said that the object of the limitation is "to exempt the party from prosecution, unless the husband or wife of such party should commence the prosecution against him or her." In *State v. Oden*, 100 Iowa, 22, it was said that the limitation is "grounded, not in the interests of the public, but in the fact that the offense is primarily against the innocent partner." Some of the language quoted, although applicable to the cases in which it was used, was not strictly correct as statements of rules of general application. For example, under the statutes of this state a single person may commit the crime of adultery, and in such a case, as the prosecution cannot be commenced by the spouse of the person to be prosecuted, it may be commenced, notwithstanding what was said in *Bush v. Workman*, and *State v. Roth*, *supra*, by the spouse of the person with whom the crime was committed. *State v. Wilson*, 22 Iowa, 364. See, also, *State v. Mahan*, 81 Iowa, 121. Although the crime of adultery may be regarded as primarily an offense against the innocent spouse of the person guilty of it, yet it is also an offense against the state. *State v. Corliss*, *supra*. It was said in the case last cited that "there are few, if any, offenses that are more directly against the peace, happiness, and good order of society" than the crime of adultery. It appears from the cases to which we have referred that the

statute under consideration is somewhat flexible, meaning the spouse of the person prosecuted when he is married, and, when he is not, the spouse of the person with whom the crime was committed; but whether the marriage relation must exist at the time the prosecution is commenced is a question this court has not heretofore determined. In the case of *State v. Russell*, 90 Iowa, 569, it appeared that the wife of James Coulthard had committed adultery with her co-defendant, Burt Russell. The prosecution was instituted by Coulthard. At that time an action for divorce brought by his wife was pending. She subsequently obtained a divorce and married her co-defendant, before the trial was had. We said that it was only necessary to the prosecution of the case that it be instituted by Coulthard; the divorce and remarriage of the wife after the prosecution was commenced did not cancel the offense, nor bar the prosecution for it. It was held in *In re Smith*, 2 Okla, 153 (37 Pac. Rep. 1099), that under the statutes of Oklahoma a divorce prevents a prosecution for the offense of adultery. But the determination of the question before us depends upon the statute and decisions of this state. The conclusion which may fairly be drawn from them is that the crime of adultery is an offense against the innocent spouse of a person guilty of it, and against the state, for which the divorce and subsequent marriage of the guilty party do not atone, nor constitute a bar to prosecution. The fact that the guilty spouse has obtained a divorce from the one who is innocent does not lessen, nor in any manner affect, the wrong which the latter has suffered; and public policy and considerations of justice would demand the punishment of the guilty, under such circumstances, as strongly as though there had not been a divorce and remarriage. The statute under consideration does not necessarily limit a prosecution to cases in which complaint is made by a person who is the husband or wife of the guilty spouse at the time the complaint is made, but the phrase "the husband or wife" refers to the

relation existing at the time the offense is committed, rather than to that which exists when complaint is made.

2     The fact that in this case Worthley, with knowledge of the crime of the defendant, again married Mrs. Worthley, did not condone the defendant's crime nor affect the demands of justice against him. We conclude that this prosecution was properly commenced on the complaint of Worthley. Our conclusion is authorized by the statute, and is in harmony with considerations of justice and sound public policy.

II. The appellant contends that the court erred in admitting testimony which tended to show adulterous intercourse at other times than that specified in the indictment.

3     That contains but one count, and charges that the alleged crime was committed "on the 16th day of October, A. D. 1897." It was said in *State v. Donovan*, 61 Iowa, 278, that, "where the charge is of one act of adultery only, in a single count, to which evidence has been given, the prosecution is not permitted to introduce evidence of other acts committed at different times and places." 2 Greenleaf Evidence, section 47, was cited in support of that statement of the law, and it was referred to with approval in *State v. Oden*, 100 Iowa, 22. Counsel for the state deny the correctness of the statement with much earnestness, and cite in support of their denial *Thayer v. Thayer*, 101 Mass. 111; *Com. v. Bell*, 166 Pa. St. 405 (31 Atl. Rep. 123); *State v. Markins*, 95 Ind. 464; 3 Rice Criminal Evidence, section 539; and Bishop Statutory Crimes, section 682. Attention is also called to the fact that in neither of the two cases decided by this court was the statement of law in question necessary to a determination of the case, nor was it, in fact, applied. We do not find it necessary to decide whether the statement correctly represents the law. The state was not required to confine its evidence to the commission of the crime charged on the date specified in the indictment, but was authorized to show

that it was committed at any time within eighteen months preceding the finding of the indictment. *State v. Briggs*, 48 Iowa, 416; Code, sections 5164, 5285. We do not find in the record any admission or testimony which shows that adultery was committed on the date set out in the indictment. The statements in the record are "that the court, over the objection of the defendant, permitted the state to introduce evidence of other and subsequent acts of adultery than that charged in the indictment, to-wit: October 16, 1897," and that, after giving some preliminary testimony, Mrs. Worthley testified, notwithstanding objections of the defendant, "to other acts of adultery with defendant, had subsequent to said date alleged in said indictment, to-wit, October 16, 1897, and continuing until November 7, 1897." Conceding that several acts of adultery were shown to have been committed on different dates, it is not shown which of the acts were first proven. The defendant interposed, to a question which asked Mrs. Worthley to state the various acts of sexual intercourse of which she and the defendant were guilty, an objection to proof of any acts of adultery excepting at the time charged in the indictment. The court overruled the objection, at the same time remarking that "it is probable they will have to elect one or the other of the times," and in response to that the county attorney said, "Yes, that may come later on." It does not appear that the matter was referred to again until after the verdict was rendered. In each of these cases of *State v. Donovan*, 61 Iowa, 278, and *State v. Oden*, 100 Iowa, 22, more than one act of adultery was shown, but the state elected to rely upon the first one proven, and this court held that the defendant was not prejudiced by the

4 proof of more than one act. If the state could have been required to elect upon what act to rely for a conviction, and the defendant desired that such election be made, he should have asked it before the cause was submitted to the jury; and, since he failed to do so, he is not entitled to any relief on the ground that the election was not made.

III. It appears that the county attorney was assisted in the prosecution of the case in the district court by attorneys who are alleged to have been disqualified, by reason of their connection with another case, to appear for the state in this case. Section 305 of the Code provides that  
5 an attorney "interested in any civil action brought or to be commenced, in which a recovery is or may be asked upon the matters involved in" a criminal prosecution, shall not be allowed to assist the county attorney in such prosecution. It appears that two weeks before the indictment in this case was found the defendant commenced an action against Herbert Worthley and the father and a brother of Mrs. Worthly, in which he alleged that they had conspired together, and attempted by force to compel him to leave the county, and sought to recover damages for the alleged unlawful acts. Worthley filed an answer, which contained a counterclaim, in which he averred that Smith had alienated the affections of his wife, and caused them to separate, but expressly stated that criminal intercourse was not charged. Judgment for ten thousand dollars, on account of the alleged wrong, was demanded. Worthley was represented in that action by the attorneys in question. It is contended for the state that a recovery was not asked by Worthley in the civil action on account of matters involved in this prosecution, but we do not find it necessary to decide the question thus presented. It is admitted that the attorneys were not guilty of any intentional wrong. It is not shown that the court had any knowledge of the civil action, and it does not appear that any objection was made to their appearance before the verdict was returned. Attention was called to the alleged disqualification of the attorneys for the first time in the defendant's motion for a new trial. Attorneys who represented the defendants in this case also represented him in the civil case, and they knew, when the trial in the district court was commenced, that the attorneys in question had appeared for Worthley in the civil case. We think that by failing to object



to their appearance within a reasonable time after the defendant was informed of it, he waived all right which he may have had to object to it. We do not find any prejudicial error in the proceedings in the district court, and its judgment is AFFIRMED.

DEEMER, J. (dissenting).—If Mary Worthley, instead of remarrying her former husband, had contracted a second marriage with some other person before the commencement of the prosecution, who could or should have made the complaint? The majority opinion does not squarely answer this problem. And yet I think the fair inference is that the first husband, although divorced, may commence the prosecution.

6 This is not, in my judgment, a proper construction of the statute. It is the husband or wife of the injured person at the time the prosecution is commenced who must make this complaint. Such is the proper grammatical construction of the statute, and such construction harmonizes all our former holdings. The Oklahoma case announces the proper rule, as I understand it. Disturbance of the relation between husband and wife on complaint of a former divorced husband is not in accord with my view of sound public policy. If the husband against whom the offense is committed waives his right to prosecute by securing a divorce from his wife, he should not be permitted to disturb a second marriage, entered into in good faith, and with the best of motives. Public policy accords with the proper construction of the statute, and I think it clear that it is the husband or wife bearing that relation at the time the proceedings are instituted who must make the complaint. These views are sustained by *State v. Russell*, 90 Iowa, 569; *Bush v. Workman*, 64 Iowa, 206; *State v. Corliss*, 85 Iowa, 18; *State v. Bennett*, 31 Iowa, 24; *State v. Oden*, 100 Iowa, 22; *State v. Roth*, 17 Iowa, 336.

II. I am not entirely satisfied with the second division of the opinion. Impressed, however, that much that is said in the *Donovan* and *Oden Cases* is contrary to the great weight

of authority, and opposed to sound reason, I am content with the conclusion reached in that branch of the opinion. The judgment should, in my opinion, be reversed.

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MARY BRADT, Appellant, v. THE NEW NONPAREIL COMPANY.

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122 541

**Libel of the Dead: RIGHT OF ACTION BY MOTHER.** Code, section 5086, making the publication of libel concerning a deceased person, which tends to scandalize the surviving relatives of the deceased, punishable criminally, does not make the publisher of a libel concerning an adult deceased person civilly liable to the mother of the deceased for shame, humiliation, and mental anguish suffered by her on account thereof.

*Appeal from Pottawattamie District Court.*—HON. N. W. MACY, Judge.

WEDNESDAY, MAY 17, 1899.

ACTION for libel. The trial court sustained a demurrer to the petition, and plaintiff appeals.—*Affirmed.*

*J. B. Sweet* for appellant.

*Frank H. Gaines and Mayne & Hazelton* for appellee.

DEEMER, J.—The only question presented by this appeal is this: May a mother recover damages for a libel published of and concerning an adult son, published after his decease? The damages sought to be recovered in this action are for humiliation, shame, and mental anguish of the mother, caused by an alleged libelous publication concerning her deceased son, George Bradt. The publication, that is set forth in the petition, is undoubtedly libelous *per se*. But the pivotal question is, may plaintiff recover damages therefor? Section 5086 of the Code makes it a crime to maliciously blacken or vilify the memory of one who is dead by a libelous publica-

tion tending to scandalize or provoke his surviving relatives or friends; and there is no doubt that for the publication set out in plaintiff's petition defendant was subject to a criminal prosecution, provided the article was published without sufficient justification. But is it liable civilly to the mother of the deceased? She did not sue in a representative capacity, and, if she had, she could not recover, for it is manifest no injury was done to the estate of her deceased son. It seems that contemptuous demeanor towards a corpse was, by the Roman law, an insult to the heir of the deceased, and that action could lie therefor. Dig. 47, 10, 11. The rule that an heir may recover for a libel of one deceased does not seem to have gained a foothold in this country, and we know of no principle that will sustain such an action. There was nothing in the article that tended in any manner to reflect on the plaintiff, and her sufferings were the same in kind as the publication produced on any of the other relatives or close friends of deceased. To permit recovery in this case would allow the mother of any person libeled to bring suit in her own name for the consequential damages done to her feelings, and the death of the person libeled would be a wholly irrelevant matter; for the suffering is in kind the same whether the person libeled be living or dead. We have not been cited to an authority, and after diligent search, have been unable to find one, which authorizes a recovery in such a case. On the other hand, the following cases hold such an action will not lie. *Sorenson v. Balaban* (Sup.) 42 N. Y. Supp. 654 (4 Am. Cases N. Y. 7); *Wellman v. Publishing Co.*, 66 Hun, 331 (21 N. Y. Supp. 577). The trial court correctly sustained the demurrer, and its judgment is

**AFFIRMED.**

NOAH C. WEIMER V. ECONOMIC LIFE ASSOCIATION OF  
CLINTON, IOWA, Appellant.

**Life Insurance: CERTIFICATE OF EXAMINER: Estoppel.** Under Code, section 1812, providing that an insurance company whose examining physician certifies that an applicant is a fit subject for insurance shall be estopped to set up the assured was not in the condition of health required by the policy when issued or delivered, unless the same was procured by fraud or deceit of assured, a company whose physician so certifies cannot set up the falsity of warranties made by assured as to his condition, where the physician was not misled or deceived

*Appeal from Buena Vista District Court.*—HON. LOT  
THOMAS, Judge.

WEDNESDAY, MAY 17, 1899.

ACTION on life insurance policy. Judgment on verdict directed for the plaintiff, and the defendant appeals.—*Affirmed.*

*Hayes & Schuyler* and *D. F. Johnson* for appellant.

*F. H. Helsell* for appellee.

LADD, J.—The policy in which the plaintiff is named as beneficiary was issued on the life of Elizabeth Weimer July 2, 1895, and she died April 25, 1897. Indorsed thereon was a copy of her application, containing the following, among other questions and answers: "Q. Have you ever had any of the following diseases: Consumption? A. No. Chronic or persistent coughing or hoarseness? Ans. No. \* \* \* Diseases of the liver? Ans. No. \* \* \* Q. State particulars of any illness, constitutional disease, or injury you have ever had, giving date, duration, and remaining effect, if any. Ans. None. \* \* \* Q. When did you last consult

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a physician? Ans. Three months. Q. For what? Ans. Indigestion. \* \* \* Q. Are you in perfect health, as far as you know or believe? Ans. Yes." Attached was this warranty: "I also agree that all of the foregoing statements and answers, as well as those that I make to the association's medical examiner in continuation of this application, are by me warranted to be true, and are offered to the association as a consideration of the contract."

The various amendments to pleadings, and the several motions attacking them, require no attention. The defense was based entirely on averments to the effect that the foregoing answers were false, so known to be by the assured, and made to defraud, and that on the faith of such answers, which were warranties, the policy was issued. It may be conceded that, but for section 1812 of the Code, this defense would have been good. We set out that section: "In any case where the medical examiner, or physician acting as such for any life insurance company or association doing business in the state shall issue a certificate of health or declare the applicant a fit subject for insurance, or so report to the company or association or its agent under the rules and regulations of such company or association, it shall be thereby estopped from setting up in defense of the action on such policy or certificate that the assured was not in the condition of health required by the policy at the time of the issuance or delivery thereof, unless the same was procured by or through the fraud or deceit of the assured." The affirmative answers of the physician to the printed questions on the application bring his report clearly within the provisions of this statute. "(47) Are you satisfied that there is nothing in the applicant's physical conditions, habits, personal or family history, not distinctly set forth, tending to shorten her life? A. Yes. (48) Do you unquestionably recommend the applicant for insurance? A. Yes." If there was nothing peculiar about her, tending to shorten life, then certainly she was a fit subject for insurance, and the physician in so saying recom-

mended her for insurance. The precise language of the statute need not be used. Where, in answer to one or more questions, or in some other way, the examiner, in words or in language so meaning, declares that applicant is a fit subject for insurance, it is sufficient. The very evident purpose of the statute is to prevent the defeat of recovery on any policy where the company has, by its skilled agent, examined and passed upon the fitness of the applicant for insurance. The estoppel is directed to inquiry as to the condition of health, and it is quite immaterial what representations have been made or warranties given. The company, having investigated, and for itself ascertained and declared the condition of the assured to be such as required by its rules and regulations, will not be permitted to interpose as a defense the physical infirmities of the deceased, of which it knew, or might have known, as the result of its examination; and the fraud or deceit referred to is that of procuring the report or certificate of the physician, and not the policy, and there is no averment to the effect that the examiner was misled or deceived in any way, or that the report was the result of collusion between him and the assured. *Welch v. Insurance Co.*, 108 Iowa, 224. Whether the statute is applicable to a mutual company is not involved, as the record does not show defendant to have been such. —AFFIRMED.

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L. SCHOONOVER V. OSBORNE BROS., WILLIAM M. OSBORNE,  
LEWIS D. OSBORNE, and DAVID OSBORNE, Appellants.

**Guaranty: CONSTRUCTION.** Under a guaranty of payment of money  
1 to be advanced by a firm of two members, the guarantor is not  
2 liable for advances made by one of them after he succeeded to  
the firm business, though such change does no harm to the  
guarantor.

**ASSIGNABILITY.** A mere offer of guaranty to a particular firm, which  
3 is inoperative until acted on by the firm, is unassignable.

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109	381
108	453
111	142
111	147
108	453
112	456
108	453
120	327
108	453
138	177

**APPLICATION OF PAYMENTS.** Where an open, running account with a firm is continued unchanged with a member who buys the  
4 interest of his co-partner and continues the business, the rule that payments on such an account will be applied to satisfy the oldest items thereof applies to payments made thereon to the firms' successor

**Judgments: SATISFACTION.** Conveyance by a judgment debtor of  
6 his equity of redemption in land sold under an execution issued thereon, and redemption by his grantee, is not a satisfaction of the judgment, or recognition of its validity by the judgment debtor.

**Account Stated: INTEREST.** Where customers of a bank receive their pass-book, knowing that charges for interest are made their-  
7 in, and make no objection thereto, the balance shown is in the nature of an account stated; and the interest charges can no more be impeached than if they had been paid, and an action brought to recover them.

**LEVY OF ATTACHMENT: *Estoppel.*** Where defendants whose property is attached file counterclaims based on a wrongful levy of attachment, and the sheriff takes manual possession, and continues to  
8 hold the property until the trial, neither party will be heard to say that there was no valid levy because notice of the attachment was not served.

**SUFFICIENCY.** The return of a writ of attachment recited that defendant was not found within the county, and it further appeared that, four days after the levy was made both on rea-  
5 and personal property, notice of the levy on the real estate was served on him. *H. id.*, that the levy was sufficient, both on his real and personal property, so far as notice was necessary to its validity.

*Appeal from Jones District Court.*—HON. W. G. THOMPSON, Judge.

THURSDAY, MAY 18, 1899.

ACTION against defendants, Osborne Bros., William M. Osborne, Lewis D. Osborne, and David Osborne, on a promissory note, and for the amount of an account against Osborne Bros., William M. Osborne, and Lewis D. Osborne, which it is claimed defendant David Osborne guaranteed. The action was aided by attachment, which it is claimed was levied upon all the property of the defendants. Defendants Osborne

Bros., William M. Osborne, and Lewis D. Osborne pleaded usury, and also a counterclaim on the attachment bond. Defendant David Osborne denied the allegations of the petition; alleged that, if he signed the note and guaranty bond sued on, he was not in his right mind when he did so, and that there was no consideration therefor; and further alleged that he made no guaranty to plaintiff, but that his guaranty, if any, was to the firm of Shaw & Schoonover. He also alleged that his liability on the guaranty, if any, has been extinguished by payment of the principal obligation, and further pleaded a counterclaim on the attachment bond. On the issues thus joined the case was tried to a jury, resulting in a verdict and judgment for plaintiff in the sum of thirty-two thousand and forty-six dollars and sixty-four cents. Defendants appeal.—*Affirmed* in part, and *reversed* in part.

*Sheean & McCarn, M. W. Herrick, F. O. Ellison and Jamison & Smyth* for appellants.

*Remley, Ney & Remley and Ercanbeck & Lawrence* for appellee.

DEEMER, J.—Prior to June 28, 1894, Shaw & Schoonover was a co-partnership consisting of W. T. Shaw and plaintiff, doing a banking business in the city of Anamosa, Iowa. On that day the firm was dissolved, and plaintiff purchased, and became the sole owner of, the assets of the firm. Osborne Bros. is also a co-partnership, engaged in the livery business, and in the buying and selling of stock. Its members were William M. and Lewis D. Osborne. This co-partnership had been doing business with the firm of Shaw & Schoonover for many years prior to its dissolution, and continued to do business with plaintiff thereafter, and until the commencement of this suit. The note on which the action in part is based is for ten thousand dollars, and was executed by Osborne Bros. and David Osborne, the other defendant, on the first day of January, 1891. The account which is the



other part of plaintiff's cause of action is for money advanced Osborne Bros. by Shaw & Schoonover, and by Schoonover individually, covering a period of years from August 5, 1882, down to August 5, 1896, and the balance claimed to be due is seventeen thousand two hundred and six dollars and thirty-one cents. Plaintiff seeks to charge defend-

1 ant David Osborne with the payment of this account

by reason of the following instrument of guaranty: "Anamosa, Iowa, May 25th, 1894. I hereby agree to be security to Shaw & Schoonover for whatever sum of money they have, or may hereafter, let my sons, Osborne Brothers, have to use in their business. David Osborne." The account covers interest items amounting to nearly eleven thousand dollars, which it is claimed were charged from time to time on daily balances, with the knowledge and consent of Osborne Bros. These charges were made at the rate of ten per cent. until the legal rate by contract was changed to eight and after that at eight per cent. There never was any written agreement by Osborne Bros. to pay any rate per cent. as interest. The account that Shaw & Schoonover had with Osborne Bros. was never closed, but was continued after plaintiff succeeded to the interests of his firm just as it had been prior to that date. Osborne Bros. were charged with checks drawn on the bank, and with interest, and credited with the deposits, just as if there had been no change in the membership of the banking firm. After Schoonover succeeded to the business of that firm, Osborne Bros. deposited more than twenty thousand dollars, which was credited to their account. At the time of the dissolution of the firm they were indebted to it in the sum of sixteen thousand five hundred and eighty-five dollars and eighty-five cents, as shown by the books of the bank. Defendant David Osborne asked instructions to the effect that, if the jury found his mental condition was such at the time he signed the note and guaranty that he did not know what he was doing, their verdict should be for him. He further requested

the court to charge that he was not liable on the guaranty for money advanced by plaintiff, and that, if Osborne Bros. made payments on their account after the dissolution of the firm of Shaw & Schoonover which equaled or exceeded the amount due that firm at the time of its dissolution their verdict should be for him, in so far as the account was concerned. Some other instructions were asked, which it is not necessary to refer to at length. The court refused these instructions, and charged the jury that plaintiff was entitled to rely on the letter of guaranty, and that David Osborne was responsible to him for the amount of his account against Osborne Bros.

As there was no evidence of David Osborne's mental incapacity, the court was right in not submitting that question to the jury. The other propositions are of more difficulty; and the first is, is defendant David Osborne liable to plaintiff on a guaranty made to Shaw & Schoonover? Announcement of a few elementary  
2 principles of law will help to solve this question: A contract of guaranty or suretyship is said to be *strictissimi juris*, and one in which the guarantor has the right to prescribe the exact terms upon which he will enter into the obligation, and to insist on his discharge if those terms are not observed. It is not a question whether he is harmed by a deviation to which he has not assented. He may plant himself on the technical obligation: "This is not my contract. '*Non haec in foedera veni.*'" *Barns v. Barrow*, 61 N. Y. 39; *Kingsbury v. Westfall*, 61 N. Y. 356; *Fellows v. Prentiss*, 3 Denio, 512; *Allason v. Rutledge*, 5 Yer. 193; *Bussier v. Chew*, 5 Phila. 70; *Penoyer v. Watson*, 16 Johns. 100. "A rule never to be lost sight of in determining the liability of a surety or a guarantor is that he is a favorite of the law, and has a right to stand on the strict terms of his obligation, when such terms are ascertained. This is a rule universally recognized by the courts, and is applicable to every variety of circumstances." 1 Brandt

Suretyship (2d ed.), 134, 135; *People v. Chalmers*, 60 N. Y. 154; *State v. Churchill*, 48 Ark. 426 (3 S. W. Rep. 352, 880). Again it has been said: "A surety or a guarantor usually derives no benefit from his contract. His object generally is to befriend the principal. \* \* \* The guarantor is liable only because he has agreed to become so. He is bound by his agreement, and nothing else. \* \* It has been repeatedly decided that he is under no moral obligations to pay the debt of his principal. Being then bound by his agreement alone, and deriving no benefit from the transaction, it is eminently just and proper that he should be a favorite of the law, and have a right to stand on the strict terms of his obligation. To charge him beyond its terms, or to permit it to be altered without his consent would be, not to enforce the contract made by him, but to make another for him." In applying these rules courts have usually held that a guaranty addressed to a particular person can only be acted upon and enforced by that party. See *Taylor v. Wetmore*, 10 Ohio, 490; *Bank v. Liefendorf*, 90 Ill. 396; *Crane Co. v. Specht*, 39 Neb. 123 (57 N. W. Rep. 1015); *Penoyer v. Watson*, 16 Johns. 100. Thus, in *Smith v. Montgomery*, 3 Tex. 199, the defendant wrote and forwarded a letter of credit, as follows: "Col. Smith & Pilgrim—Gentlemen: Mr. A. W. Tennard wishes to get some dry goods on time. If you will furnish, I will see you paid, as far as the amount of \$3,000, and much oblige, yours, with respect, James S. Montgomery." This was addressed on the back to Smith alone. Smith and Pilgrim had been partners in business, but a short time before had dissolved partnership. The letter, on the back, being addressed to Smith alone, it was delivered to him, and he supplied the goods to Tennard, who failed to make payment; and suit was brought to recover from Montgomery, as guarantor. The court, in deciding the case, says: "Upon consideration, we must look to the address on the face of the letter, and not to the direction on the back of it, to ascertain the party to

whom its application and promise were intended by the writer to have been made; that, bearing upon its face a direction and address full and complete and free from ambiguity, we must take that as the certain criterion to determine its application, without regard to the discrepancy in the superscription. If the letter did not bear upon its face the proper address, resort might be had to the superscription, or perhaps to other extrinsic evidence, if necessary, to determine its direction and application. *Bell v. Bruen*, 1 How. 169. But when the contract, on its face, is complete and perfect, and certain to every intent, as well in respect to the parties as to the subject-matter, we do not think it admissible to resort to anything extrinsic to control the express terms and clear import of the face of the instrument. \* \* \* It is a well-settled rule, applicable to this class of cases, that the liability of a guarantor or surety cannot, by implication or otherwise, be extended beyond the terms of his actual engagement. It does not matter that a proposed alteration would even be for his benefit, for he has a right to stand upon the very terms of his agreement. The case must be brought strictly within the terms of the guaranty, when reasonably interpreted, or the guarantor will not be liable." To the same effect, *Barns v. Barrow*, 61 N. Y. 39. We are aware that some courts have held that, when a guaranty is made to a house as a house, the circumstance of taking in a new partner makes no difference as to the extent of the engagement. See *Pease v. Hirst*, 10 Barn. & C. 122; *Greer v. Bush*, 57 Miss. 575; *Barclay v. Lucas*, 1 Term R. 291, note. But in all of these cases there was something on the face of the instrument which indicated that the guarantor intended to be bound to the house or concern, no matter what its membership. Thus, in the first case, the note guarantied was made payable to the firm or order. In the last, the conduct of one Jones in a shop or counting house was guarantied.

The true rule, we think, is that announced by Chief Justice Marshall in the case of *Grant v. Naylor*, 4 Cranch,

224. The facts were as follows: A letter of credit was addressed to John and Joseph Naylor. The goods were furnished by John and Jeremiah Naylor. The letter was designed for John and Jeremiah Naylor, and action was brought by them thereon. Chief Justice Marshall, in deciding the case, says: "That the letter was really designed for John and Jeremiah Naylor cannot be doubted; but the principles which require that the promise to pay the debt of another shall be in writing, and which will not permit a written contract to be explained by parol testimony, originate in a general and a wise policy, which this court cannot relax so far as to except from its operation cases within the principle. Already have so many cases been taken out of the statute of frauds which seem to be within its letter that it may be well doubted whether the exceptions do not let in many of the mischiefs against which the rule was intended to guard.

\* \* \* On examining the cases which have been cited at the bar, it does not appear to the court that they authorized the explanation of the contract which is attempted in this case. This is not a case of ambiguity. It is not an ambiguity patent, for the face of the letter can excite no doubt. It is not a latent ambiguity, for there are not two firms of the name of John & Joseph Naylor & Co., to either of which this letter might have been delivered. \* \* \* In such a case the letter itself is not a written contract between Daniel Grant, the writer, and John and Jeremiah Naylor, the persons to whom it was delivered. To admit parol proof to make such a contract is going further than courts have ever gone, where the writing is itself a contract, not evidence of a contract, and where no pre-existing obligation bound the party to enter into it." 4 Cranch, 224. See, also, as sustaining these conclusions, *Devaynes v. Noble*, 3 Eng. Ruling Cas. 336; *Pemberton v. Oakes*, 4 Russ. 154; *Bill v. Barker*, 16 Gray, 62; *Barnett v. Smith*, 17 Ill. 565. In *Hunt v. Gray*, 76 Iowa, 268, we announced the same rule, as follows: "Where there is no ambiguity in the writing, there can be no resort to parol evi-

dence to ascertain the meaning of the parties, or the sense in which the words of the agreement were intended, but they must be construed according to the context and usage of the language." Aside from this there is no claim in the petition that the guaranty was to any other person or persons than those to whom it was addressed, Shaw & Schoonover, and they alone could rely upon it; and, as the guarantor did not undertake to become responsible for any money Schoonover should let his sons have for use in their business, he should not be charged therewith.

Appellee contends, however, that a contract of guaranty, under our Code, is assignable, and that Schoonover, as assignee, may recover thereon. Let it be conceded that such

3        a contract is assignable,—as we have no doubt it is,—  
yet it does not follow that a mere offer of  
guaranty is assignable before it is acted upon.

In other words, we have no doubt that the obligation of the guarantor to the firm of Shaw & Schoonover for the balance due them from Osborne Bros. at the time they dissolved was assignable, and that Schoonover became the owner thereof, and had the right to enforce the same. This is what is held in *Bank v. Carpenter*, 41 Iowa, 518. But that is quite a different proposition from the claim that Schoonover could act on David Osborne's guaranty after the dissolution of the firm of Shaw & Schoonover. In one case there is a completed contract, which is assignable. In the other there is a mere offer of guaranty to a particular firm, which is inoperative until acted upon by that firm. And this offer cannot be assigned, for the reason that the guarantor has the right to select his own creditor. If he does not have that right, then there is no difference between a general guaranty and one addressed to particular persons. That there is a difference, all the authorities are agreed, and in principle there must be; for it cannot be that one may make another his debtor without his consent and against his protest.

As the guaranty did not bind the maker for advancements made by plaintiff to the principal debtor, the next question is, can plaintiff recover for the balance due from Osborne Bros. to Shaw & Schoonover at the time of the dissolution of the last-named firm? That he may do so is certain,

unless this balance has been paid. As we have seen  
4 the account was continued as if there had been no change in the firm. By carrying this balance into the general account, plaintiff made it a part of his general running account. On this account he made credits exceeding two hundred thousand dollars after the dissolution of the firm. How should these credits be applied? The general rule is that they should be applied to the payment of debit items in the order of their dates. *Pidcock v. Voorhies*, 84 Iowa, 710; *Bank v. Hollinsworth*, 78 Iowa, 575, and authorities cited. Is that rule applicable to the facts in this case? Had the account been broken at the time the firm of Shaw & Schoonover dissolved, had it not been continued by Schoonover as an open, continuous account, or had Schoonover done anything to indicate that he did not intend the general rule as to application of payments to apply, there would be much force in appellee's position, and the authorities cited by his counsel would apply. See *Porter v. Railroad Co.*, 99 Iowa, 351. But, as we understand it, the account was not even balanced at that time. If it was, it was simply to indicate the value of the assets of the firm; and Schoonover thereafter treated that balance, or the amount then due, as a part of one continuous, open account against Osborne Bros. Indeed, he sues on a continuous account commencing in August, 1882, and continuing without interruption down to August 5, 1896. He no doubt thought that he could rely on the guaranty in suit, and never for a moment looked upon the account as other than a continuous, open, and running one. Under such a state of facts, it is clear that the credits made from time to time on that account should be applied to the extinguishment of the oldest items

thereof; and, as these credits are very largely in excess of the amount owing by Osborne Bros. to Shaw & Schoonover, that account is fully settled and paid, and there can be no recovery from David Osborne on account of his guaranty. See, as sustaining these conclusions, *Hersey v. Bennett*, 28 Minn. 86 (9 N. W. Rep. 590); *Devaynes v. Noble*, 1 Meriv. 572; *Crompton v. Pratt*, 105 Mass. 255. What is known as the "Clayton Case" (*Devaynes v. Noble, supra*) is exactly in point, as also is *Pemberton v. Oakes*, 4 Russ. 154. *Morgan v. Tarbell*, 28 Vt. 498, is another case much like the one at bar, and it is there held that payments should be applied to the satisfaction of the old balance. The court erred in not instructing as requested, and in charging the jury that plaintiff might rely on the written guaranty.

Defendants filed a motion to release and discharge the attached property because no notice of the attachment was ever served on them. The property attached consisted of certain personal property belonging to Osborne Bros. and L. D. Osborne, and certain real estate and personal property belonging to David Osborne. It affirmatively appears that no notice in writing was served upon William M. or L. D. Osborne. A copy of the inventory and appraisement was delivered to L. D. Osborne, but this is in no sense a notice, and does not meet the requirements of the statute. But as defendants Osborne Bros. and L. D. Osborne filed counterclaims based upon the wrongful levy of the attachment, and as the sheriff in fact took manual possession of the property, and continued to hold it down to the time of trial, neither party should be heard to say that there was no valid levy. Plaintiff surely cannot deny it, and as defendants have elected to counterclaim for their damages, they should not be permitted to say, after they have suffered defeat upon that issue, that there was in fact no levy. *Hamilton v. Hartinger*, 96 Iowa, 7. Had defendants stood upon their motion to discharge, and not pleaded a counterclaim for damages, they would undoubtedly be entitled to a release and return of the



property. *Bank v. Kellog*, 81 Iowa, 124, is not in point. The attempted levy in that case was on real estate; and plaintiff, by objecting to defendants' evidence to sustain his counterclaim, evidently withdrew all claim to the property under the invalid attachment. There is this additional fact with reference to the levy upon David Osborne's property: The return shows that no notice was given him, but it also recites that David Osborne was not found within the county. It further appears that the writ was levied upon his property on August 6, 1896, and that notice of the levy on real estate was served upon him on the 10th day of August, 1896. The levy, therefore, was sufficient, both on the real and personal property of David Osborne, and the motion to discharge was properly overruled. *Bank v. Converse*, 101 Iowa, 307.

II. Appellee has filed a motion to dismiss the appeal because appellant David Osborne has satisfied and performed the judgment. The facts with reference to this contention are that defendant David Osborne, after sale of his  
6 real estate on execution upon the judgment rendered  
in this case, sold his equity of redemption to W. T. Shaw, who in turn conveyed to Ella Osborne, one of defendant's daughters, who made redemption from the execution sale. The conveyance was really from David Osborne to his daughter, and the deed was made to Shaw to secure him for money advanced. After the redemption was completed, Shaw conveyed to Ella Osborne, and she made a mortgage back to Shaw to secure him for the amount advanced. David Osborne has not in fact paid the judgment, or any part thereof, nor has he in any manner recognized its validity. The motion to dismiss the appeal is therefore overruled. As sustaining our conclusions on this proposition, see *Tiffany v. Tiffany*, 84 Iowa, 122; *Grim v. Semple*, 39 Iowa, 570.

III. But one question remains, and that is, what is the amount of interest to which plaintiff is entitled on his account against Osborne Bros.? The court instructed that if they found plaintiff had furnished Osborne Bros. from

time to time a full statement of the account, and that they retained possession thereof without objection, then  
7 such statements amounted to a settlement, and were binding on them and their surety, David Osborne; and that plaintiff was entitled to recover the amount advanced by him to Osborne Bros., and used by them in their business, not exceeding the amount claimed in the petition. The account, as we have seen, embraced large amounts charged as interest on daily balances. The evidence tended to show that these damages were entered on the pass book or bank book delivered to Osborne Bros., and that they made no objection thereto. Plaintiff virtually conceded that, but for the fact that Osborne Bros. had notice and knowledge of these charges, he could not recover interest. Do these facts change the rule? We think they do. As the jury may have found that defendants Osborne Bros. received their pass book, and knew of the charges for interest therein made, and made no objection thereto, the balance shown was in the nature of an account stated, and the interest charges can no more be impeached than if they had been paid, and action brought to recover them. *Allen v. Nettles' Adm'r*, 39 La. 780 (2 South. Rep. 602); *Knickerbocker v. Gould*, 115 N. Y. App. 533 (22 N. E. Rep. 573); *Isett v. Ogilvie*, 9 Iowa, 313. Osborne Bros. do not plead usury. They simply say that no interest can be charged. Under this state of the record, the instructions asked by defendants relating to the subject of interest were properly refused. The judgment as to Osborne Bros., William M. Osborne, and Lewis D. Osborne is **AFFIRMED**; and, for the error pointed out, the judgment as to David Osborne is **REVERSED**.

B. A. HALL, Appellant, v. R. M. COFFIN *et al.*

**Intoxicants: ILLEGAL SALES: *Presumption.*** Where a pharmacist sells in two months on 19 different days to one man, and on 80 to another, whisky and alcohol by the half pint, and makes similar  
1 sales to others, some of whom drank intoxicants, as a beverage and became intoxicated, the presumption of illegal sales is authorized, which is not overcome by reputation that the business was lawfully conducted, and by each purchaser signing the statutory statement that he did not habitually use liquor as a beverage, and that it was for medicinal use.

**PLEA AND PROOF.** Where a petition to enjoin the sale of intoxicants  
2 charges a continuing offense, evidence of illegal sales *post litem motum* is competent.

*Appeal from Tama District Court.*—HON. OBED CASWELL,  
Judge.

THURSDAY, MAY 18, 1899.

ACTION in equity for the abatement of an alleged nuisance, and to enjoin the defendant from maintaining a place in which to sell or to keep for sale intoxicating liquors in violation of law. There was a hearing on the merits, and a decree in favor of the defendants for costs. The plaintiff appeals.—*Reversed.*

*Daniel Reamer* for appellant.

*O. H. Mills* and *H. J. Stiger* for appellee.

ROBINSON, C. J.—The petition in this case was filed in April, 1896. It alleges that the defendants are registered pharmacists, and that the defendant R. M. Coffin is the owner of a lot, which is described, and of a building thereon; that he is the owner of certain intoxicating liquors kept for illegal sale in the premises; and that the defendants established,

kept, and maintained, prior to the filing of the petition, and were then keeping and maintaining, a place for the sale of intoxicating liquors as a beverage, in violation of law. The defendants admit that they are registered pharmacists, and that R. M. Coffin is the owner of the premises, and of intoxicating liquors and furniture and fixtures kept therein, and deny all allegations of the petition not thus admitted.

I. It is shown that R. M. Coffin made numerous sales of intoxicating liquors during the time commencing with November, 1895, and ending with October, 1897. In November and December, 1895, he made to J. W. Shievly, on nineteen different days, sales which included beer, brandy, whisky, and alcohol. When beer was sold the quantity was usually two bottles. The alcohol, brandy, and whisky  
1        were sold by the half pint. During the same time there were made to Frank Morrison thirty different sales of brandy, each sale for but one-half pint. The sales to these two men were nearly the same in January and February, 1896, and were continued during the year, although less frequently made, and sales were made to them in 1897. Numerous sales of the same kind were made to others, and among them were many to men who drank intoxicating liquors as a beverage, and sometimes became intoxicated, although we are of the opinion that but one of them is shown to have been in the habit of becoming intoxicated when the sales were made to him. The large number of sales regularly made to the same person, and the character and habits of sobriety of several of those to whom they were made, were sufficient to authorize the presumption that many of the sales were illegal, and to place upon the defendants the burden of showing that they were not. To rebut the presumption the defendants introduced evidence to the effect that their business was reputed to have been conducted according to law. It was also shown that each purchaser signed a request, as required by statute, to the effect that the liquor asked for was desired for medical use, and that the applicant did not

habitually use intoxicating liquors as a beverage. But that evidence was not sufficient to show that all the sales proven were legal. It was unlawful for the defendants to sell intoxicating liquor to any person who was in the habit of becoming intoxicated, and that they did so is clearly shown. We have held that the seller of intoxicating liquor is bound, at his peril, to know whether a person to whom he sells is within the prohibited class. *Fielding v. La Grange*, 104 Iowa, 530, and cases therein cited. See, also, *State v. Mullenhoff*, 74 Iowa, 271.

II. The petition in this case charges a continuing, and not a past offense, within the rule of *State v. Williams*, 90 Iowa, 513, and cases therein cited, and evidence of  
2 sales made in violation of law after the commencement of this action is competent. The evidence submitted satisfies us that the defendants are guilty as charged in the petition.

The attorney for the appellant asks the allowance of an attorney fee of one hundred dollars. It is not denied that the amount is reasonable for the service rendered, and it is allowed. The decree of the district court is REVERSED.

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110 862

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HOSMER TUTTLE v. JOHN CONE, Sheriff, A. F. SHAPLEIGH  
HARDWARE COMPANY and C. H. SWAB, Appellants.

**Declarations as to title.** Declarations affecting one's title to personal property, made previous to his acquiring title thereto under a bill of sale, are not competent evidence against him to defeat his title.

**Evidence.** Evidence of negotiations for the purchase of certain personal property, between strangers to the bill of sale thereof, is not competent to defeat the title acquired under such circumstances.

**COMPETENCY OF OPINIONS ON VALUE.** In conversion of bicycles, one not familiar with such machines in general, nor with the par-

ticular make of machine in controversy, is nevertheless a competent witness as to its value, there being other sufficient evidence of competency.

**Trover:** *TITLE: Fraudulent conveyance.* Proof of a bill of sale, duly executed and delivered to plaintiff, previous to an attachment of the property included therein by an alleged creditor of the vendor, though fraudulent in fact, is sufficient evidence of title to enable the vendee to recover in an action for conversion against the attaching creditor, in the absence of proof by the attachment plaintiff that he is a creditor of the attachment defendant

*Appeal from Cedar Rapids Superior Court.*—HON. T. M. GIBERSON, Judge.

THURSDAY, MAY 18, 1899.

PLAINTIFF states, as his cause of action, that on May 11, 1896, said company commenced an action against Shelly Tuttle for seven thousand nine hundred and seventy-eight dollars and four cents, and procured an attachment for two thousand dollars, which the defendant Cone thereafter levied upon twenty-one bicycles, "which were in possession of the plaintiff, and were his absolute and unqualified property;" that plaintiff served notice of his ownership, whereupon said sheriff demanded and received from the defendant company an indemnity bond, with defendant Swab as surety. Plaintiff alleges that said attachment was wrongfully levied upon his property; that Shelly Tuttle had no interest therein; that, by reason of the levy, he had been deprived of the property; and that the reasonable value thereof was one thousand eight hundred and ninety dollars; and that he had been damaged, by reason of the loss of the use thereof, six hundred and ten dollars; wherefore he asks to recover two thousand five hundred dollars, with interest. The defendant Cone answered, justifying under the attachment and bond, and the defendant company answered, denying that plaintiff was the owner of the property levied upon; that his pretended ownership is fraudulent; that said bicycles were turned over to him by defendants in the attachment suit for the purposes of conceal-

ing the same from the creditors of said defendants. Verdict and judgment were rendered in favor of the plaintiff for one thousand five hundred and fourteen dollars. Defendants appeal.—*Affirmed.*

*Jamison & Smyth* for appellants.

*Heins & Heins* and *Preston, Wheeler & Moffit* for appellee.

GIVEN, J.—I. Appellants' first contention is that the court erred in admitting the evidence of several witnesses as to the value of the bicycles; the claim being that said witnesses were not shown to be competent to testify to their value, because not familiar with the value of bicycles in general, nor of that particular make. We have examined  
1 each of these complaints, and find that what is urged goes rather to the weight to be given to the testimony of the witnesses than to their competency. We think the showing as to their competency was sufficient to allow their evidence to be taken.

Appellants complain that they were not permitted to ask a witness, on cross-examination, as to the value of the wheels, based upon the fact of their number; that they were in the original frames, in a vacant storeroom in Cedar Rapids, for four or five days. The witness was fully cross-examined as to their value, and we do not see that these facts so materially entered into the question of value as that the ruling was prejudicial.

Appellants complain that they were not permitted to show by the witness Swab that plaintiff said to him, along in the latter part of April or the first of May, that  
2 he was going to sell the wheels in Cedar Rapids for his brother. Plaintiff's claim of ownership rests upon a bill of sale from Shelly Tuttle, dated and acknowledged May 2, 1896, in California, and a statement such as that sought to be proven, made

prior to the time he acquired his title, would not tend to defeat that title.

It is also complained that the court excluded certain letters from Swab to Shelly Tuttle offering to buy the wheels, which were handed to the plaintiff, to be transmitted,

3 April 29, 1896. This proposition was between parties strangers to this transaction, and it does not follow that because thereof the plaintiff may not have acquired a valid title under the bill of sale.

II. Appellants ask an instruction to the effect that the jury was not called upon to determine whether the defendant in the attachment suit was indebted to the plaintiff therein, nor whether said attachment would be sustained, and that there were but two issues in this case, namely, whether plaintiff was the owner of the bicycles at the time they were taken on the attachment, and their fair market value at that time. As to the issues involved, the court so instructed; as to the other part of the instruction asked, it was clearly erroneous. In *Day v. Kendall*, 60 Iowa, 414, a case similar to this the court said: "The evidence, we think, shows a sale and delivery by Kendall to Garrett. Whether the sale was fraudulent or not, we do not determine. If it should be  
4 conceded that it was, it was sufficient to pass the title, as between the parties to it, and it was also sufficient, as against the plaintiffs, unless they were creditors of the vendor. To enable them to seize and hold the property under their attachments, after it had been actually sold and delivered to Garrett, it was incumbent upon them to aver and prove that they were creditors of the vendor. This they failed to do. We think that the court erred in rendering judgment in their favor, as against the intervener." The court instructed that it was incumbent on the defendant company to show that, at the time of the issuing of the attachment, the defendants therein were indebted to the attachment plaintiff, and that, there being no evidence in this case of such indebtedness, the claim of appellants that the transfer of



the bicycles to plaintiff was fraudulent was not sustained. We discover no evidence upon which to have found any indebtedness, and therefore conclude that there was no error in refusing the instruction asked, or in giving this one complained of. As no prejudicial errors appear, the judgment of the district court is AFFIRMED.

### J. B. CLIFTON v. L. E. LANGE, Appellant.

**Libel: PLEA OF JUSTIFICATION.** A plea, to an action for libel, made as a complete defense to the charge of malicious intent, that

- 1 "every fact charged in the publication as having been done by plaintiff was the truth, and in fact done as therein charged," is
- 4 bad, when acts with another are charged, in that it does not plead the truth of all the libelous charges.

**MITIGATION: Demurrer.** A plea, in mitigation for damages for a libel, that the matters set forth in the publication were told

- 2 defendant by others before the publication was made, is bad, on demurrer, where the libelous statement purports on its face to be made on the personal knowledge of the writer.

**PRIVILEGE: Public officer.** The publication of an attack upon the

- 8 private character of a public official is not privileged.

*Appeal from Pocahontas District Court.*—HON. W. B. QUARTON, Judge.

FRIDAY, MAY 19, 1899.

**ACTION** at law to recover damages caused by the publication by the defendant, in a weekly newspaper, of the following, of and concerning the plaintiff: "Modern Justice (?) Should two men hold up a third man on the streets of Laurens in broad daylight, and rob him of sixty-five dollars to seventy-five dollars, the robbers would be sure to serve a term in the penitentiary, and the authorities might find it difficult to prevent them from being lynched. Yet modern justice, in the disguise of law, committed a crime equally as great a few days ago, and the methods employed and tactics plied were

108	472
117	356
117	357

108	472
128	205

108	472
139	746

no more dishonorable than highway robbery. The parties who did the holding up were J. S. Clifton, a justice of the peace, and J. W. Convey, a constable, and the party they attempted to rob was Chas. Snider; and they probably would have succeeded, had not the matter become public, and outsiders come to his rescue in time to appeal to a higher court, where snap judgments are not engineered by the aid of the court, and save his home from being sold on a judgment rendered by two vultures sitting ready to pounce upon and divide the spoils. Did J. S. Clifton do as he would like to be done by if he was in Snider's place? Did he give both sides justice? Was there any honorable act done by the justice from start to finish? If so, what? Could the James gang have done worse, if they had presided in Clifton's place? Take down these signs of 'Justice,' and print in large letters, and hang there instead, the more appropriate sign of 'Modern Crucifixion.' Honorable justices and constables are essential and necessary to every community, but when they become hawks and vultures, perched in dark corners waiting for some weakling to fall by the wayside, and pounce upon them and devour them because they are weak, poor, and helpless, then, the sooner they are exposed and receive deserved punishment, the better it will be. Now, right here is where the dishonorable act of the court comes in, and where the gross and dishonest prejudice of J. S. Clifton, the justice of the peace, helped in the rotten and infernal steal. He knew that Paige was Snider's attorney; he knew that, if Snider was able to conduct the case himself, he would not have hired an attorney, and as Paige was the first attorney to appear in the case, and had only left the room to get authorities to cite, why did he not wait until Paige got back? Why did he not give the defendant one-tenth of the courtesy he had extended to the plaintiff by running around town and apprising them that the case would be contested on the part of the defendant? Why did he not do that, we ask? He shows by his act that he was a party to the theft and dishonorable

act." Plaintiff alleges that this publication was willfully and maliciously made concerning him, to his actual damage five thousand dollars, for which and for exemplary damages he asks judgment. The defendant answered, admitting that he published said articles, "but denies any malice in the publication." He further answered, setting up at great length six defenses, some of which are claimed to be a justification of the publication, and others in the mitigation of damages. The plaintiff demurred to all the defenses, except the first, as stated above, and the demurrer was sustained to all except the fourth. After the evidence was all introduced, the fourth defense was, on motion of the plaintiff, withdrawn from the consideration of the jury. The case was submitted to the jury on the issue of malice in fact, and as to the amount of damages. Verdict and judgment were rendered in favor of the plaintiff for two hundred dollars. Defendant appeals. —*Affirmed.*

*J. A. O. Yeoman and Wright & Nugent* for appellant.

*F. H. Helsell* for appellee.

GIVEN, J.—I. In view of the questions involved, we regret that the case is submitted without argument for appellee. The publication is conceded to be libelous and actionable *per se*. By the first division of the answer, we have the single issue whether it was maliciously published, and it was upon this issue that the case was submitted to the jury. The defendant, "for a second and complete defense, \* \* \* states that every fact charged" in the publication to have been done by the plaintiff "was the truth, and in fact done as therein charged." Such a plea must be as broad as  
1 the charge made. This is not so. It merely pleads as true what are stated to have been the acts of the plaintiff, and does not plead the truth of the libelous charges. To plead that part of the charge is true is not sufficient; the entire libelous charge must be alleged to be true; and, if this

was the defendant's purpose, he should have pleaded it in unmistakable language. *Hollenbeck v. Ristine*, 105 Iowa, 488; Townshend Slander and Libel, section 212 The demurrer was properly sustained to this defense.

II. The third division of the answer sets up matters in mitigation of damages. It is a lengthy statement of matters concerning the transactions mentioned in the publication, which the defendant alleges he had heard, and that were told to him before he made the publication. In Newell Defamation, section 71, after stating the general rule that evidence of previous publications by others is inadmissible in mitigation of damages, it is said: "To this rule there seems to be one exception: If defendant, in repeating the story as it reached him, gives it as hearsay, and states the source of his information, then, but only then, is the fact that he did not originate the falsehood, but innocently repeated it, allowed to tell in his favor, as proving that he bore the plaintiff no malice." It is further said: "But where the  
2 libel does not, on the face of it, purport to be derived from any one, but it is stated as of the writer's own knowledge, then evidence is wholly inadmissible to show that it was copied from a newspaper or communicated by a correspondent." See, also, *Blocker v. Schoff*, 83 Iowa, 266. There was no error in sustaining the demurrer to this division of the answer, nor in excluding evidence in support of it, nor in the instruction complained of.

III. In the fifth division of the answer it is alleged, as a complete defense, that said publication is privileged. The law is well settled that a fair and true publication, without malice, of a judicial proceeding, or of anything stated as a part thereof, or "a criticism of an official act of a public officer, made without malice, and not containing any attack upon his private character," is privileged. Townshend Slander and Libel, section 208, and note; *McBee v. Fulton*, 47 Md. 403; *McAllister v. Press Co.*, 76 Mich., 338 (43 N. W. Rep. 431); 13 Am. & Eng. Enc. Law, 419. In *Comfort*

v. *Young*, 100 Iowa, at page 630, we said: "It was for the court to determine whether the publication was privileged or not." The publication admitted to have been made is not privileged, for the reason that it contains an attack upon the private character of the plaintiff, and it is not, therefore, a privileged publication; and there was no error in sustaining the demurrer to the fifth division of the answer.

IV. In the fourth division of the answer, which was withdrawn on plaintiff's motion, the defendant recites at length, as facts, matters preceding and occurring on the trial referred to in the publication, substantially as set forth in the third division. In conclusion, he alleges that said matters set out as facts were true, that the publication was of comments fairly arising thereon, and that the imputations published were true, and were in good faith and without malice. For reasons already stated, this plea is not broad enough to constitute a justification on the grounds of the truth of the matters charged. The plea is not as broad as the charge. Therefore there was no error in withdrawing it on plaintiff's motion. We discover no prejudicial error, and the judgment is therefore **AFFIRMED**.

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111	186
108	476
128	441
128	460

In the Matter of B. C. BRADLEY, H. G. HANSEN *et al.*, Petitioner's Application for Drainage of Lands, Appellants.

**Special Proceedings: JURY TRIAL.** In the absence of a special provision requiring it, there is no right to trial by jury in condemnation cases.

**SAME.** The provision of Code, Section 1947, that in cases of applications under laws Twentieth General Assembly, chapter 186, section 2, to secure the drainage of wet lands, appeals may be taken in the same manner as in the location of roads, does not imply that the method of trial shall also be the same.

**SAME.** An application under laws Twentieth General Assembly, chapter 186, section 2, to secure the drainage of wet lands, is a

special proceeding, in which a jury will not be allowed unless specifically provided for; and Code section 3131, providing that an action in the nature of an application under said law to secure  
4 the drainage of wet lands must be by ordinary proceedings, and section 3438, providing that the rules governing the prosecution of civil actions shall be followed in special proceedings not otherwise regulated, so far as applicable, do not authorize a jury trial on such an application.

CONSTITUTIONAL LAW. It is not a violation of the constitutional pro-  
2 vision securing to a citizen his property unless deprived thereof by "due process of law" to refuse a jury trial in condemnation proceedings.

**Appealable Orders.** An appeal lies from a ruling refusing to set aside  
1 an assignment of a cause for trial by jury, and to set it for trial to the court.

*Appeal from Appanoose District Court.*—HON. M. A. ROBERTS, Judge.

FRIDAY, MAY 19, 1899.

THIS is an application under section 2, chapter 186, Laws Twentieth General Assembly, to secure the drainage of wet lands. There was a remonstrance to the petition. Upon the hearing the board of supervisors found against the petitioners, who appealed to the district court. In the district court the cause was assigned for trial by jury. Petitioners moved that this assignment be set aside, and the action set for trial to the court. The motion was overruled, and from that ruling this appeal is taken.—*Reversed.*

*Baker & Moore* and *A. F. Thompson* for appellants.

*C. F. Howell* for appellees.

WATERMAN, J.—I. We have held that an appeal lies  
1 from a ruling such as that in question. *Price v. Insurance Co.*, 80 Iowa, 408.

II. We may premise what we have to say with the statement that, in the absence of some special provision requiring

provision is made for trial by jury in some cases of this nature—that is, in some special proceedings—excludes the thought that all are triable in that manner of common right.

We do not think that appellees' claim derives any  
4 support from sections 3431 and 3438 of the Code.

The first of these sections provides, in effect, that an action of this kind must be by ordinary proceedings. The idea is to distinguish the method of trial from equitable procedure. That it does not mean to award a jury trial, is substantially held in the cases just cited, and also in *Shaw v. Nachtwey*, 43 Iowa, 653, and *Duffield v. Walden*, 102 Iowa, 676. Section 3438 provides that the rules governing the prosecution of civil actions shall be followed in special proceedings not otherwise regulated, so far as applicable. Keeping in view the common-law rule that a jury trial is not permissible in an action of this character, and it would seem that this is very indefinite language in which to award that right. We repeat what we said as to the other section, the cases cited are not in accord with any such construction. We reach the conclusion that the trial court erred in assigning this proceeding for trial by jury, and its action is therefore REVERSED.

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ORA D. PITKIN, Executrix, v. E. E. PEET, Appellant.

**Estates:** ANTE NUPTIAL CONTRACT: *Legatees and devisees.* An antenuptial contract, providing for the payment annually of a stated sum of money to a testator's widow, is a charge upon the personal estate of the testator, and real estate devised by the will cannot be subjected to the payment thereof, though all the personal estate has been bequeathed by the will and the legacy has been materially diminished by a judgment awarding the widow a distributive share in such personal estate.

*Appeal from Jones District Court.*—HON. WILLIAM G. THOMPSON, Judge.

FRIDAY, MAY 19, 1899.

ACTION at law to recover an amount alleged to be due for the occupation and use of land. The cause was tried by the court without a jury, and judgment was rendered in favor of the plaintiff. The defendant appeals.—*Reversed*.

*Jamison & Smyth* for appellant.

*D. McCarn* for appellee.

ROBINSON, C. J.—In the year 1877, James M. Peet entered into an antenuptial contract with Matilda Weaver, whom he subsequently married. The contract provided that, in case she survived him, she should receive, during widowhood, annual interest on the sum of three thousand dollars. He died testate, having provided in his will for the payment of the interest required by the contract. The will devised to William G. Peet, son of the decedent, certain land, and gave to Ora D. Pitkin, his daughter, a legacy. She is now the executrix of his estate, and as such is the plaintiff in this action. On the first day of June, 1895, the district court of Jones county made an order in probate, in terms authorizing the plaintiff to collect the rents and profits which should accrue from three hundred and twenty acres of land in Jones county, which were described, and to apply the sums which should be collected in the payment of interest then due, and thereafter to become due, to Matilda Peet, under the antenuptial contract and the will. The plaintiff alleges that no part of the interest due at the time the order was made, or which has since become due, has been paid; that when the order was made the defendant was in possession of the land, and has since occupied and used it; and that the value of such occupation and use is nine hundred and sixty dollars. Judgment for that amount was demanded. The answer alleges that the order of the district court referred to was void



because the court lacked jurisdiction to enter it, and for the reason that it was based upon a certain decree of the district court which was reversed by this court, and for the further reasons that the plaintiff has money sufficient for the payment of the amount due and to become due to Matilda Peet, and that the estate of William G. Peet, now deceased, of which the defendant, E. E. Peet, is administratrix, is not liable for that amount. As a further defense, the defendant alleges that the order in question was reversed by this court; that, as the plaintiff has possession of the personal property of the estate of James M. Peet deceased, which is ample for the payment of the amount due Matilda Peet, she is not entitled to resort to the real property in question, which was devised to William G. Peet, for funds with which to make the payment. The judgment rendered in favor of the plaintiff is for \$381.61 and costs. In *Peet v. Peet*, 81 Iowa, 172, the antenuptial contract was sustained, and the widow was denied an interest in the real estate of her deceased husband. In *Pitkin v. Peet*, 87 Iowa, 268, we held that Matilda Peet was entitled to a distributive share of the personal property of her deceased husband. In that case, and in *Pitkin v. Peet*, 96 Iowa, 748, we held that William G. Peet was not personally liable for the interest which accrued to Matilda Peet under the antenuptial contract and the will, and that the legacy given by the will to Ora D. Pitkin was not a charge on the estate of James M. Peet, as against William G. Peet. The effect of the decision to which we have referred, and of a decree of the district court considered in the case last cited, was to hold that the land devised to William G. Peet was not liable for the payment of the legacy of Ora D. Pitkin, nor the interest which was then due, or should thereafter become due, to Matilda Peet. See, also, *Pitkin v. Peet*, 99 Iowa, 314. The land in question is a part of that devised to William G. Peet. In consequence of our holding that Matilda Peet was entitled to a distributive share of the estate of James M. Peet, the personal property of the estate is not sufficient to

pay the bequest to Ora D. Pitkin, and it is urged that it would be unjust to her and inequitable, to place the burden of paying the amount now due Matilda Peet, and the sums which shall hereafter become due her, upon the personal property of the estate, and to that extent take from the property available for the payment of the legacy of Mrs. Pitkin, and which is not now sufficient to pay it in full. There seems to be much force in what is thus said. The share which William G. Peet obtained from his father's estate is, we understand, more valuable than the bequest to Mrs. Pitkin. That has already been diminished by the share of personal property to which Matilda Peet is entitled, and to further deplete it, by holding that the interest due and to become due to Matilda Peet must be paid from the personal property in the possession of the plaintiff, appears to work an injustice. But we are governed by the will as it has been construed by former decisions of this court, and as it must now be construed, and by the law applicable to this case. By the law of this state, the debts and charges against the estate of a decedent, where no other provision is made by will, are payable from the personal property of the estate, if it be sufficient for that purpose. Code 1873, sections 2386-2388; *Laverty v. Woodward*, 16 Iowa, 1; *Foteaux v. Lepage*, 6 Iowa, 123; *Gladson v. Whitney*, 9 Iowa, 267. And that is true where all the personal property is bequeathed by will, if it be not made to appear that it was the intent of the testator that the debts should be paid from real property. *McGuire v. Brown*, 41 Iowa, 650. See, also, *Reynolds v. Reynolds*, 16 N. Y. 257. The obligation to pay Matilda Peet the interest for which her antenuptial contract provided is a debt which the estate of James M. Peet owes, and for the payment of which the personal property of the estate is liable. Debts of an estate are payable before legacies. Code 1873, section 2420 (Code, section 3348). As we have heretofore held, the real estate in question cannot be subjected to the payment of the claims of Matilda Peet, and the only source from which the payment

can be made is the personal property of the estate in the possession of the plaintiff. The order which purported to empower the plaintiff to take possession of the land in controversy was really based upon a judgment of the district court which was reversed by this court, and the plaintiff does not claim that the order should be treated as a final adjudication, but states that whether the plaintiff has the right to collect the amount due and the sums to become due to Matilda Peet from the rents and profits of the land is an open question. For the reasons shown, the question must be answered in the negative.

We are also asked to determine whether the distributive share of Matilda Peet is to be taken before or after an allowance is made for the payment of sums to which she is and may become entitled. We do not find that this question is presented by the record before us; hence do not decide it. But it is proper to say that the question now asked was not involved nor determined in *Pitkin v. Peet*, 87 Iowa, 268. The defendant E. E. Peet is the widow of William G. Peet. As administratrix of his estate, she took possession of the land in question, and has received rent for it; but this action is against her as an individual, and not in her representative capacity. In view of the conclusion heretofore stated, we do not find it necessary to decide whether a recovery could properly have been had of her, as an individual, even had she wrongfully collected rents as administratrix. The judgment of the district court is REVERSED.

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LOLA B. DANIELS, Appellant, v. CITY OF DES MOINES.

**Salary of Police Matron:** ORDINANCE AND STATUTE. In the appointment of a police matron, a city need not necessarily act under the provisions of Acts Twenty-fifth General Assembly, chapter 15; and if such appointment be made, instead, in pursuance of a city ordinance, and upon a salary fixed therein, the appointee cannot recover of the city the difference between the salary so fixed and that provided by the statute.

*Appeal from Polk District Court.*—HON. THOMAS F. STEVENSON, Judge.

FRIDAY, MAY 19, 1899.

ACTION at law in which plaintiff seeks to recover compensation for services as a police matron of the city of Des Moines. Defendant denied all liability, and pleaded payment. The case was tried to the court, a jury being waived, resulting in a judgment for defendant. Plaintiff appeals.—*Affirmed.*

*John McLennan* for appellant.

*J. E. Mershon* and *L. Ward Bannister* for appellee.

DEEMER, J.—The Twenty-fifth General Assembly passed an act (chapter 15) providing for police matrons. In substance, it provides that, in cities of twenty-five thousand or more inhabitants, the mayor shall designate one or more station houses within the city for the detention and confinement of women and children under arrest, and see that provisions are made by which the room or cells set apart for them shall be separate from, and out of sight of, the rooms or cells where male prisoners are confined; that he shall appoint for such station houses two or more respectable women, to be known as "police matrons," in the same manner, and subject to the same restrictions, as patrolmen; that the aforesaid matrons shall have charge of all women and children under arrest, performing searches, accompanying such as may require aid to court, and giving them such comfort as may be within their power. To be eligible to such appointment, the woman must be over thirty years of age, of good moral character and sound physical health, and her application must be indorsed by at least ten resident women of good standing. Such matrons to hold office until removed by death, resignation, or discharge, and be subject to the authority of the board of police, or chief

of police, and subject to the authority in command of the stations. These matrons to receive a salary of not less than the minimum salary paid to patrolmen in the city where appointed. The local authorities are also required to appropriate annually such sums as may be necessary to secure the separate care and confinement of women and children under arrest, and for the appointment, salary, and maintenance of police matrons. It was also provided that these police matrons should have the right of entering and visiting all houses of detention in such cities. The act was passed April 24, 1894. On April 1, 1895, the then mayor of the defendant city made the following appointment: "Des Moines, Iowa, April 1, 1895. To Whom it May Concern: This is to certify that Mrs. Lola B. Daniels, the wife of John W. Daniels, city jailer, has been appointed as temporary matron for the city jail from April 1, 1895, up to and including December 31, 1895, and that her salary, as such temporary matron, shall be thirty-three and one-third dollars (\$33 1-3) per month, in accordance with the appropriation ordinance as passed for the year 1895. Isaac L. Hillis, Mayor." Plaintiff claims that by this instrument she was appointed a police matron, under the act above referred to; that she performed the services of such office, and that she is entitled to compensation at the rate of sixty dollars per month, that being the minimum amount paid to patrolmen at that time; that she has received but three hundred and seventy-five dollars; and that she is entitled to judgment for three hundred and eighty-five dollars. Defendant denies that plaintiff was appointed a police matron, and says that she was simply appointed a temporary matron for the city jail, pursuant to an ordinance or resolution appropriating three hundred dollars to pay for the services required of such matron.

Now, while the instrument appointing the plaintiff does not refer to the act of the twenty-fifth general assembly, nor to her as a police matron, yet, if it was the intention of all parties concerned to appoint the plaintiff to that position, she

may recover, notwithstanding these omissions, and the mere fact that the city neglected to make the designation required by law will not defeat her action. And, if plaintiff was appointed police matron, then, as the statute fixed her compensation, a contract whereby she agreed to accept less than the amount fixed by statute would be contrary to public policy and void. *Insurance Co. v. Brainard*, 72 Iowa, 130; *Griffin v. Clay County*, 63 Iowa, 413; *Purdy v. City of Independence*, 75 Iowa, 356; *Gilman v. Railroad Co.*, 40 Iowa, 200; *Adye v. Hanna*, 47 Iowa, 264. But, to avail herself of any of these rules, it must appear that plaintiff was appointed a police matron in virtue of the statute upon which she relies. The city may not have seen fit to avail itself of this law, and if it did not do so, and did not in fact appoint plaintiff to the office thereby created, she cannot recover compensation for having performed the duties thereof. The mayor himself says he did not appoint plaintiff under the statute; that it was under a provision made by the city, independent of statute. The written evidence of appointment does not belie this claim. On the contrary, it is entirely consistent with it. And there is some other evidence tending to confirm the defendant's contention. It may be, if we were trying the case anew, that we would reach a different conclusion; but this is a law action, triable on assignments of error, and as the judgment has support in the evidence, we cannot interfere. As sustaining our conclusions on the law of the case, see *Peters v. City of Davenport*, 104 Iowa, 625. The judgment of the district court is AFFIRMED.

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NANCY DENTON v. W. W. ORDWAY, Appellant.

**Damage:** HUSBAND AND WIFE: *Earnings of wife.* In an action of a wife to recover damages for injuries inflicted, her loss of time  
1 cannot be considered as an element of damages, where it is not shown that she has any employment apart from her husband.

MS 487  
116 189

**Evidence: RELEVANCY.** In an action to recover for injuries inflicted  
2 by defendant it is error to admit evidence of their permanence,  
where the petition does not allege such fact.

**SAME.** Whether plaintiff is a member of any church is immaterial in  
8 an action to recover damages for injuries inflicted by defendant,

*Appeal from Monona District Court.*—HON. G. W. WAKE-  
FIELD, Judge.

FRIDAY, MAY 19, 1899.

FROM a judgment on a verdict in favor of the plaintiff,  
the defendant appeals.—*Reversed.*

*Mackenzie, Dewey & Jackson* and *B. F. Ross* for appel-  
lant.

*McMillan & Kendall* and *J. A. Pritchard* for appellee.

LADD, J.—The husband of the plaintiff was largely indebted to the defendant, and, owing to some trouble, the latter assigned the claims to his son, who obtained judgment for over one thousand three hundred dollars, and also procured an order in proceedings auxiliary to execution, requiring the delivery of certain notes to the clerk of court. Instead of doing this, Denton and his wife, the plaintiff, went to the defendant's house to make settlement of the indebtedness. The plaintiff testified that when on the porch, and about to enter the defendant's office, he demanded from the kitchen, where he was reading, "What in hell do you want?" They then turned into a hallway leading to that room, and the husband said, "Well, I have come to pay you what I owe you." Thereupon the defendant cursed him, declined to settle, and threatened to law him as long as he had a dollar. The plaintiff then said to her husband, "Oh, come; there is no use trying to settle with a mad man," and he withdrew from the house, passing the plaintiff, who did not then start. The defendant thereupon moved towards her, and either struck or grabbed her by the shoulder, and pushed her towards the door,

and using opprobrious language, ordered her out. In turning or reaching for the banister, she sprained her ankle, but walked out to the wagon. She made no outcry, and, though the husband claims to have seen the defendant strike or grab and push his wife, he offered no interference. The defendant admitted ordering them from his house, the use of profane language in anger, but denied having struck, grabbed, pushed, or touched the plaintiff, and he is corroborated by other witnesses.

I. In the fourth instruction, the court, among other things, told the jury that "in assessing such damages you will consider and take into account the character and extent of the injuries inflicted upon the plaintiff by reason of such assault, so far as the same has been shown by the evidence, the physical pain and suffering thereby caused and endured by the plaintiff, the length of time she was unable to perform her household duties by reason thereof." The plaintiff had testified she was unable to work for more than a week after being injured. There was no evidence that she had any business or employment apart from her husband. Under these circumstances the rule announced in *Tuttle v. Railway Co.*, 42 Iowa, 518, and *Nichols v. Railway Co.*, 68 Iowa, 736, obtained, that the jury ought not to have been permitted to take plaintiff's loss of time into consideration as an element of damages.

II. The petition does not allege the injuries to have been permanent. Nevertheless, a physician was allowed to testify, over the objection of the defendant, that as the sprain was the second one to the same ankle, the injury would likely be permanent. The evidence was not pertinent to any issue in the case. As the jury might consider the extent of the injury, and therefore its permanency, under the instruction set out, we think the ruling in receiving this evidence erroneous and prejudicial.

III. This was a part of the examination of the plaintiff, over objections to each question: "I will ask you if you



are a member of any church? A. I am. Q. What denomination. A. The Baptist. Q. Do you live in the  
3 community where your neighbors and friends are of the same church? A. No, sir. My church is above Ute. None of the members live near." On what theory this testimony was received does not appear. That her membership of any church or society ought not to be considered in fixing damages is too apparent for discussion. See *Railway Co. v. Bush*, 101 Ind. 582. Possibly, no prejudice resulted. We call attention, however, to the error that it may be avoided on another trial. We discover no other errors in the record. Because of those pointed out, the judgment is REVERSED.

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CYRUS BAKER, Appellant, v. W. D. MILLS, Sheriff, and BENJAMIN CHAMBLERS, Intervener.

**Conversion of Judgment: RIGHTS OF COLLATERAL HOLDER.** Where a judgment is assigned as collateral security for an indebtedness in a sum less than the face of the judgment, the assignee cannot maintain an action for conversion against an officer because of a levy and sale of the judgment, subject to the assignment, under an execution against the judgment plaintiff.

*Appeal from Marshall District Court.*—HON. G. W. BURNHAM, Judge.

FRIDAY, MAY 19, 1899.

MANETTA P. GATTON, having recovered a judgment against her husband, George Gatton, for six thousand five hundred and fifty-seven dollars, assigned it to the plaintiff, September 24, 1896, as security for the payment of an indebtedness of one thousand dollars. The intervener, Chamblers, caused an execution to issue on his judgment of three hundred and eighty-seven dollars and costs against the Gattons, to be levied on Mrs. Gatton's judgment October 12, 1896, and

the same to be sold to the intervener on the fourteenth day of November. The sheriff was duly notified of the assignment the day after the levy. The plaintiff seeks to recover the value of the judgment, on the ground of its conversion by the sheriff. Among other things, the defendant and intervener averred that the judgment was sold subject to the assignment, and mention of this was omitted from the sheriff's bill of sale by mistake. The petition was dismissed, and the plaintiff appeals.—*Affirmed.*

*Volney Kent* for appellant.

*Binford & Snelling* for appellee.

LADD, J.—The assignment of the judgment against her husband by Mrs. Gatton to the plaintiff, her brother, was not filed in the office of the clerk or minuted on the margin of the judgment docket. Code, section 3936. But the sheriff was duly notified thereof immediately after the levy of the intervener's execution on such judgment. Thereupon it was appraised, and sold subject to their assignment. This is fully established by the evidence, notwithstanding some conflict, though through oversight the bill of sale was not so drawn. The appellant contends that, as the assignment was executed as security, the title passed to the plaintiff, with constructive possession, and that the rule with reference to a levy on a mortgaged chattel applied. *Campbell v. Leonard*, 11 Iowa, 489; *Gordon v. Hardin*, 33 Iowa, 550; *Wells v. Sabelowitz*, 68 Iowa, 238.

If this be true, then, as neither title nor possession was in the execution defendant, there was nothing of hers to levy on, and the title of the plaintiff was not affected by the sale. It is not a case where the owner's title is disputed, and the sale made, and possession transferred in spite of his claim, as in *Rand v. Barrett*, 66 Iowa, 731. The possession of the judgment, if in plaintiff, was not disturbed, and his title expressly recognized. This does not mean that the

sheriff may not be liable in damages, if any were sustained for trespass [see *Rankin v. Ekel*, 64 Cal. 446 (1 Pac. Rep. 895)], but that, if he has converted nothing, he is not chargeable with conversion. On the other hand, if Mrs. Gatton's interest in the judgment might be levied on, the sale was subject to the plaintiff's interest in it, and properly made. Though the bill of sale was absolute in terms, no more is claimed under it, and a correction was requested. In this state of the case it seems quite immaterial what executions were afterwards issued. The plaintiff has not suffered the slightest injury, and there is nothing in his claim to favorably impress a court of equity.—AFFIRMED.

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ROSE FURLONG, Appellant, v. THOMAS CARRAHER.

**Undue Influence: EVIDENCE** Evidence that the son of a testatrix, a woman of advanced years and rather weak of mind, took charge of her farm and the personal property kept thereon, and largely directed the disposition of the same while his mother was living, is not sufficient to show undue influence over the mother in the execution of her will, it not appearing that the son had anything to do with the making of that instrument.

**EVIDENCE: Opinions of subscribing witness.** In a contest over a will on the ground of mental incapacity to make a will, it is not competent to ask a subscribing witness what was the testator's "capacity to make a will," as such question calls for a decision of the whole case.

**SAME.** A question calling for the opinion of a subscribing witness to a will, as to the condition of the testator's mind, based upon the testimony given by him before the jury, is not competent where the witness has not testified to any facts tending to prove unsoundness of mind, and this, though a subscribing witness may, if asked, give his belief as to testator's mind, without stating the grounds of the belief.

**USE OF TRANSCRIPT: Exclusions waived** Where, by agreement of parties, the testimony of a witness taken on a former trial is read in evidence, all rulings excluding evidence when offered on the first trial are waived.

108	492
115	492
108	492
122	252
108	492
132	719

*Appeal from Polk District Court.*—HON. C. A. BISHOP,  
Judge.

SATURDAY, MAY 20, 1899.

This is a contest over the probate of the will of Bridget Carraher, deceased. The plaintiff and contestant alleges that the testatrix was not of sound and disposing mind at the time the will was executed, and that the same was procured through the undue influence of defendant, who is a son of the deceased. There was a trial to a jury, resulting in a directed verdict for defendant, and plaintiff appeals.—*Affirmed.*

*James Nugent and W. A. Connolly* for appellant.

*F. W. Dodson, A. A. McLaughlin, and W. A. Spurrier*  
for appellee.

DEEMER, J.—Bridget Carraher was seventy-five years old at the time of her death, which occurred on or about February 9, 1894. Her husband died eight or nine years ago, and the management of the property devolved upon Thomas Carraher, a son. On October 21, 1893, Mrs. Carraher made a will, by which she devised a house and lot to one daughter; two hundred dollars and her bedding and clothing to another; two hundred dollars to plaintiff, who is yet another; and the residue and remainder of her property to defendant, Thomas Carraher, who was also charged with the payment of all just debts and funeral expenses. It is this will which plaintiff contests. A careful consideration of the evidence leads us to the conclusion that, while the testatrix was feeble in body, and somewhat weak of mind, yet that she had a sound and disposing mind and memory. Any other conclusion would be without sufficient support in the evidence, and hence the trial court did not err in holding that

the deceased had sufficient mental capacity to enable her to execute the will. The evidence as to undue influence is not sufficient to justify a verdict in favor of 1 contestant. The most that can be said for it is that defendant, who had charge of the farm and the personal property kept thereon, largely directed the disposition of the property while his mother was alive, and dictated the course that should be pursued with reference thereto. This was largely because he had charge of the farm, and had conducted the business from the time he was old enough to look after such matters. There is no evidence whatever tending to show that he had anything to do with the execution of the will, or that he had any knowledge thereof until some time after it was made. The duty of the trial court in such cases is well understood, and we are of opinion that there was no error in directing the verdict.

II. One of the subscribing witnesses to the will was asked this question: "Q. Now, from what you have testified here before this jury, what do you say as to the condition of her mind at the time she executed this will,—whether she was in such mind as to understand the effects of the will upon her property and her children? What would be your 2 judgment on that?" It was objected to as incompetent, irrelevant, and immaterial, and for the further reason that the witness has not testified to sufficient facts to entitle him to give an opinion as to her mental capacity. The court sustained the objection. Again, this same witness was asked: "Q. Now, I renew my question, Mr. Blanchard: From what you have testified to of her actions and conduct on the occasions when she was getting these wills drawn, what do you say as to her mental capacity to make a will, and to know the effects upon her children and her property?" To which defendant interposed the same objection as theretofore made to a similar question to this witness. This objection was also sustained. The last question was clearly incompetent, for the reason that the witness is called upon to decide

the whole case. *Pelamourges v. Clark*, 9 Iowa, 1; Rogers Expert Testimony, p. 47. The first question does not call for the condition of the testatrix's mind at the time the will was executed, based upon the fact that witness was one of the subscribing witnesses, but asks for his opinion as to the condition of her mind, based on the testimony given

3 by him before the jury. As he had not stated any facts tending to disclose unsoundness of mind, the court correctly sustained the objection. Had the witness been asked the simple question as to the testatrix's condition of mind at the time the will was executed, it should have been answered, for it is a well-settled general rule that a subscribing witness may state his belief as to the testatrix's condition of mind without first showing grounds on which that belief is based. Schouler Wills (2d ed.), section 187; *Parsons v.*

*Parsons*, 66 Iowa, 754; Greenleaf Evidence, section  
4 440. The testimony of one John M. Day, another subscribing witness, given upon a former trial, was, by agreement, read in evidence on this trial. He was asked a question somewhat similar to that propounded to the other witness. The court trying the case when the evidence was taken sustained the objection. What has already been said answers the complaint made of the ruling on this evidence. There is this additional thought, however which is conclusive, and that is that the evidence of Day, as taken upon the former trial, was read by agreement of the parties on this trial. Under this agreement, all rulings excluding evidence were, of necessity, waived. There was no way in which the rulings made at the prior trial could be corrected, for the witness was not present to give evidence. We have already said that the trial court was right in directing the verdict, and need only add that the evidence adduced, viewed in its strongest light, does no more than create a suspicion of undue influence. It is not sufficient to justify a verdict for the contestant. The judgment is therefore **AFFIRMED**.

108	496
111	576
108	496
142	42

HARRY P. GALER *et al*, Appellants, v. A. A. GALER.

**Gifs:** COMPETENCY OF DONOR: *Evidence.* The donor was over 70 years of age, and his physical health was failing. His memory  
1 had failed, and he was in the habit of repeating things. Witnesses who well knew him testified that his mind and judgment were sound. Another witness testified that he had a transaction with him and he was rational and intelligent. *Held*, insufficient to establish his incompetency to make a valid gift.

**Appeal:** STRIKING AMENDMENT TO ABSTRACT. An amended abstract,  
2 containing material matter, filed by the appellee after the time required by the rules, will not be stricken.

*Appeal from Franklin District Court.*—HON. B. P. BIRD-SALL, Judge.

SATURDAY, MAY 20, 1899.

ACTION for an accounting. Trial to court. Judgment for defendant, and plaintiffs appeal.—*Affirmed.*

*John M. Hemingway* and *D. W. Dow* for appellants.

*Taylor & Evans* and *E. P. Andrews* for appellee.

WATERMAN, J.—The plaintiffs are the next of kin of one Dr. J. B. Galer, who died in Franklin county on September 11, 1895. The defendant is the widow of such decedent, and the administratrix of his estate. The claim made is that Dr. Galer, during the last two or three years of his life, was mentally incompetent to transact business, and that defendant took charge of and conducted his affairs; that by fraud, and upon false pretenses, she possessed herself of his entire estate, amounting to some fifty thousand dollars in money and four thousand two hundred and ninety-three dollars and fifty-nine cents in mortgage securities, besides some real estate, for which she also secured conveyances. These

allegations are denied, and it is averred, in substance, that all the property which defendant has, and which formerly belonged to her husband, was given her by him in his lifetime. This action was begun December 15, 1895. No question is made as to the right of plaintiffs to maintain a proceeding of this character during the pendency of this administration, so we shall proceed to a consideration of the case on its merits.

Dr. Galer had a legal right to give away his property, if he saw fit to do so, and had a contracting mind at the time. Doubtless, under the facts, the burden is upon defendant to establish the gift. *Samson v. Samson*, 67 Iowa, 253.

1 But, the gift being established, if it is sought to be avoided on account of the mental incompetency of the donor the burden of showing this fact will be upon plaintiffs. *Teegarden v. Lewis*, 145 Ind. Sup. 98 (44 N. E. Rep. 9). The defendant married decedent in the year 1872, and from that time until the latter's death they lived happily together. They were childless. The plaintiffs are collateral relatives. During the latter years of his life, Dr. Galer was afflicted with heart disease; and for two or three years just preceding his death, which occurred in his seventy-fifth year, his physical health failed steadily. It became necessary for some person to aid him in looking after his affairs, and this his wife did. As to these facts all parties agree. But plaintiffs assert that his mind failed, as well as his body, and that defendant, taking advantage of this fact and of her position, stripped him of his entire estate without his knowledge or consent. Much evidence is introduced on the issue of Dr. Galer's mental competency. It certainly establishes that his memory had failed, but we do not think it goes further than this. Many witnesses, who knew him well, and met him at his home, at social gatherings, and in business transactions, say that his mind was sound and his judgment wholly unimpaired. A witness for plaintiffs (one Myers, a banker with whom Dr. Galer did business, and who had a personal trans-



action with him during the last year of his life) says: "I don't think I ever saw Dr. Galer, in a business transaction, when he was not naturally rational and intelligent, and knew what he was doing. He had a habit of repeating things." The repetition alluded to, relates, doubtless, to the doctor's absent-mindedness, or failure of memory; and with this suggestion, we may say that the testimony of this witness represents fairly the consensus of all the opinions given. That is, taking all the testimony together, and we think the condition of Dr. Galer is found to be as this witness states it.

As to the charge of fraud in obtaining the property, there is no evidence except what is wholly circumstantial in character. To rebut it, there is the testimony of one White, who acknowledged the assignments of mortgages and the deeds of real estate from Galer to his wife. He says that these instruments were made at the request of the grantor and were voluntarily executed by him, and that Galer told him he had given about all his property to his wife. Another witness (Taylor) says that just previous to the doctor's last sickness, the latter spoke to him of a deed of property, which he said he had made to his wife. It is true that White is defendant's brother, and Taylor is one of her counsel in this case, and that some of the circumstances of defendant's case are of a suspicious character, and impress us very unfavorably. But these circumstances are of a collateral nature. They do not bear directly upon the issue of the gift. On the other hand, Taylor and White are to some extent corroborated by plaintiffs' witness Myers, who says that during the last two years of the doctor's life (and it was during this time defendant is said to have appropriated the greater part of the estate) he visited the house to arrange for loans with Mrs. Galer; that, while he saw her mostly, he talked with the doctor once or twice about the matters. These loans must have been made, in great part, at least, from money belonging to Dr. Galer. If the money was not so invested with the doctor's full consent, it is hardly possible that he could have talked with this

witness about the matter without learning the condition of affairs; or, if his wife was surreptitiously obtaining this money, it is not likely she would have permitted this witness to see and talk with her husband about the matter, thus affording opportunity for the exposure of her schemes. Upon the whole, we do not feel justified in allowing to the circumstances of which we have spoken such weight as would permit them to overcome this direct and positive evidence.

Another contention of plaintiffs is that Dr. Galer's indorsements upon the notes and certificates of deposit transferred, and his signature to many of the deeds and assignments of mortgage introduced, were forged by defendant. No evidence was taken on this branch of the case. We are asked to inspect these documents, which have been certified up, and determine the question from the knowledge thus acquired. This is a field of doubtful inquiry upon which we are invited to enter. We should certainly not be willing to accord to our own opinions any more than the dubious force which we have said is to be allowed the opinions of those who testify to the genuineness of handwriting. *Borland v. Walrath*, 33 Iowa, 130; *Whitaker v. Parker*, 42 Iowa, 585. We may say, however, that we have looked these exhibits over with no little care, and we are unable to form any definite opinion on this question from the inspection.

The motion to strike appellee's amended abstract because not filed within the time fixed by the rules of this court is overruled. The matter contained in it is material. See *Green v. Ronen*, 62 Iowa, 89.

The conclusion we reach renders it unnecessary for us to pass upon the numerous objections urged by appellee to the record before us. The evidence showing a gift to the wife has not been overcome by the testimony offered to establish mental incapacity on the part of the donor, and therefore the judgment of the district court is **AFFIRMED**.

UNIVERSITY OF CHICAGO V. HARRIS L. EMMERT, Administrator of the Estate of J. S. EMMERT, Deceased.

Appellant.

**Evidence: AUTHORITY OF SIGNER FOR CORPORATION.** A contract being assigned by an artificial person, it was competent, as showing his authority, to prove the official position, with the assignor, of the person who attached its name to the assignment.

**Construction of writings: OPINION EVIDENCE.** The opinion of a witness as to the construction of a contract is incompetent. This is for the court.

**Transaction with Decedent: EVIDENCE OF SECRETARY OF CLAIMANT.** In an action by an artificial person against a decedent's estate, the secretary of plaintiff, not shown to have any interest in the result, is not incompetent to testify to a personal transaction with deceased, within Code, section 4604, prohibiting such testimony by a party or one interested in the result.

**Defense to Subscription: BURDEN OF PROOF.** A subscription paper provided that the sums subscribed might be paid by notes. *Held*, in action on the subscription, that the burden of showing that the notes had been executed and paid was on the subscriber.

**Claims Against Estate: ARTIFICIAL PERSON: Pleading** Under Code, section 3338, *et seq.*, requiring claims against an estate to be entitled in the name of the claimant against the administrator of the estate, as such, with the name of the estate, etc., the claimant need not aver in what capacity—whether as a corporation, partnership, or person—it acted in presenting the claim, as is required in ordinary actions by section 3647, unless the pleading is assailed by motion.

**DENIAL OF CORPORATE CAPACITY.** Under Code, sections 3627, 3628, requiring a denial of partnership or corporate capacity to specifically allege the facts relied on, an averment of want of legal capacity is insufficient.

*Appeal from Linn District Court.*—HON. WILLIAM G. THOMPSON, Judge.

SATURDAY, MAY 20, 1899.

THE plaintiff filed its claim, duly verified, February 11, 1897, for a balance of eight hundred dollars, due on sub-

scription, to which was attached the contract in words following:

"Chicago, Ill., June 20th, 1889. Whereas, the American Baptist Education Society has undertaken to raise the full sum of one million dollars for the purpose of establishing a college in the city of Chicago, Illinois; and whereas, John D. Rockefeller, of the city of New York, has subscribed six hundred thousand dollars of said sum, upon condition, among others, that the whole amount of said one million dollars is subscribed: Now, therefore, in consideration of the premises, and each and every subscription to said object, we, the undersigned, agree to pay to the American Baptist Education Society, for the purpose aforesaid, and upon the condition that the full sum of one million dollars is subscribed therefor, the sums set opposite our respective names, on the first day of June, 1890: provided that each subscriber may pay five (5) per cent. of his subscription in cash on the first day of June, 1890, and the balance as follows, five (5) per cent. of said subscription every ninety days; or ten (10) per cent. of said subscription in cash June 1, 1890, and the balance as follows, ten (10) per cent. every six months, or twenty (20) per cent. of said subscription in cash June 1, 1890, and the balance as follows, twenty (20) per cent. yearly. Said deferred payments to be evidenced by promissory notes, and to draw interest from June 1st, 1890, at the rate of six per cent. per annum.

Names.	Addresses.	Am'ts.	Remarks.
John S. Emmert.	833 West Monroe St.	\$1,000."	

—And also an assignment to the plaintiff signed "American Baptist Education Society, Chicago, August 15th, 1891, by Nelson E. Blake." The answer was a general denial, with a specific denial of signatures; a denial of plaintiff's capacity to sue, also of the legal right of the American Baptist Education Society to solicit and receive or assign subscriptions; and an averment that it was neither a person, partnership, nor corporation, and that recovery could not be had, because

of the omission to execute the promissory notes. All the answer, save the general denial and that putting in issue the genuineness of signatures, was stricken on motion. When the evidence had been introduced, on motion, verdict was directed for the plaintiff. From a judgment thereon the administrator appeals.—*Affirmed.*

*Charles W. Kepler* for appellant.

*Preston & Moffit* for appellee.

LADD, J.—In the claim filed, the appellee did not aver in what capacity it acted in presenting its claim against the estate of deceased. The appellant insists that, because of this omission, no evidence could properly be received. That such an averment is essential in a petition in an ordinary action has been held by this court, and is required by statute (Code, section 3627). *Sweet v. Ervin*, 54 Iowa, 101; *Byington v. River Co.*, 11 Iowa, 502. In *Bremer County v. Curtis*, 54 Iowa, 72, it was said that the claim stands in place of a petition, as the statement of the cause of action. But the manner of pleading in probate is governed by section 3338 of the Code and the sections following, which require that claims must be entitled in the name of the claimant against the executor or administrator of the estate as such, with the name of the estate, and must be clearly stated and verified, and, if based on a written instrument, a copy of it, with all indorsements, must be set out, and, when not expressly admitted, shall be deemed denied, though specific defenses must be pleaded. These statutes are evidently intended to cover all necessarily to be included in the statement of a claim. No petition is required, and if the sections referred to are complied with substantially, when not assailed, the pleading will be deemed sufficient. *Woerner Administration*, section 389. See *Crosby v. McWillie*, 11 Tex. 94, and *In re Swain*, 67 Cal. 637, 641 (8 Pac. Rep. 497). Undoubtedly the claimant, on motion, might be compelled to state the particular capacity in which suit is brought. But if this is

not done, and that issue is made by answer, there is no reason why he should not comply with the ordinary rules of pleading. The section requiring a special defense to be pleaded prescribes no method to be pursued, and parties are relegated to the rules approved in civil actions. Code, section 2 3340. By sections 3627 and 3628 of the Code, denial of partnership or corporate capacity is made a special defense, and can only be set out by specifically alleging the facts relied on. That the American Baptist Education Society was not a natural person appeared from its name. If it was not a partnership or corporation, a general denial did not raise that issue, for in such event the facts relied on must be specifically stated. The averment of want of capacity or of legal capacity was a mere legal conclusion. It follows that there was no error in receiving the evidence, or in striking portions of the answer.

II. Thomas W. Goodspeed, called as a witness, testified that he was secretary of the plaintiff, solicited the subscription of the deceased, and saw him attach his signature thereto. It is insisted that this evidence should have been excluded, under section 4604 of the Code. While it appeared that the witness was secretary of the plaintiff, it did not show that he had the slightest interest in the result of the suit. 1 Greenleaf Evidence, section 333. The witness was presumed competent, and, there being no showing to the contrary, the objection was correctly overruled. *Muir v. Miller*, 82 Iowa, 706; *Zerbe v. Reigart*, 42 Iowa, 231; *Birge v. Rhinehart*, 36 Iowa, 371; *Wormley v. Hamburg*, 40 Iowa, 25.

III. Certain questions were asked Goodspeed, on cross-examination, calling for his interpretation of the subscription paper. It is needless to say that it was the province of the court to construe the contract. The signature 3 having been proven, a consideration was presumed. *First M. E. Church v. Donnell*, 95 Iowa, 494. The execution of the notes provided in the subscription was optional, and, if the deceased had satisfied and discharged

his contract in that way, the burden was upon the administrator so to prove. Code, section 3340.

IV. The witness Goodspeed was also asked what position Nelson Blake held in the American Baptist Educational Society. This was objected to as irrelevant and foreign to any issue in the case. As Blake attached the name of  
4 the society to the assignment, this evidence had a tendency to show Blake's authority in so doing. It was therefore admissible. But there was no denial in the answer of the genuineness of the signature to the assignment, or that it was authorized. It appeared to have been signed by the American Baptist Educational Society, and whether in fact so signed was not made an issue in the case. *Bank v. Martin*, 82 Iowa, 442. The conditions of the subscription have been fully complied with by the society, and we can discover no reason why the balance due should not be paid.—  
AFFIRMED.

VALLEY NATIONAL BANK OF DES MOINES V. H. B. CLAFLIN,  
COMPANY, Appellant.

**Receivers: RIGHTS OF CHATTEL MORTGAGEE.** A chattel mortgagee of property has an interest therein, within Code, section 3822,  
2 authorizing persons having an interest in property in danger of being lost to procure the appointment of a receiver therefor.

**EVIDENCE.** Under Code, section 3822, authorizing the appointment of a receiver of property whenever it, or its rents and profits, is in danger of being lost, and when the interest of all the parties  
1 will be thereby promoted, a receiver of personal property in process of manufacture for the market may be appointed in an action  
3 to foreclose a chattel mortgage thereon, where by reason of prior liens, the mortgagee is not entitled to possession, and where it will depreciate unless the manufacture and sale be continued.

*Appeal from Polk District Court.*—HON. THOMAS F. STEVENSON, Judge.

SATURDAY, MAY 20, 1899.

ACTION in equity to recover the amount alleged to be due on certain promissory notes made by the defendants Israel Bros. and W. C. Israel, and to foreclose a chattel mortgage on two stocks of merchandise, with furniture, fixtures, and utensils used in connection therewith, given to secure the payment of the notes. The petition also asked the appointment of a receiver. The H. B. Clafin Company and other creditors of the makers of the notes, were made parties defendant, and a receiver was appointed. From the order appointing a receiver, the H. B. Clafin Company appeals.—*Affirmed.*

*C. C. & C. L. Nourse* for appellant.

*Ayres, Woodin & Ayres* for appellee.

ROBINSON, C. J.—We are required to determine whether the plaintiff was entitled to the appointment of a receiver. The facts material to an understanding of that question are as follows: During a part of the year 1897, Israel  
1 Bros. carried on business at two places in the city of Des Moines. At one, on Locust street, articles of clothing were manufactured; and at the other, on Walnut street, dry goods, wearing apparel, and other articles were retailed. On the twenty-ninth day of October, 1897, the defendant the Clinton Woolen Manufacturing Company recovered against Israel Bros. a judgment for the sum of two thousand one hundred and thirty-nine dollars and sixty-three cents, and on the same day caused an execution to be issued and levied upon the property of Israel Bros. at the two places of business mentioned; and possession of the property thus levied upon was taken by the sheriff. After that was done, but on the same day, Israel Bros. executed to the plaintiff a mortgage upon the property held by the sheriff. A mortgage on the same property was subsequently executed to the H. B. Clafin Company, and an attachment thereon was levied



in favor of the defendant the Iowa National Bank. There was also a landlord's lien on each stock for rent, a part of which was due. On the first day of November, 1897, the plaintiff commenced its action. The petition alleged, in effect, that the Locust street stock consisted of clothing, and a large quantity of material designed to be manufactured into clothing; that it was then the proper season for selling the goods of both stocks, and that if manufacturing was stopped, and the places of business were closed for the purpose of foreclosure, great damage would result; that the plaintiff's lien on the property was larger than that of any other creditor; and that it was doubtful if the goods in both stocks would satisfy the claim of the plaintiff, which amounts to about twenty thousand dollars. It asked judgment for the amount due, for the foreclosure of its mortgage, and that a receiver of the property be appointed, with the power to continue the manufacture of clothing, and the selling at retail of goods of both stocks. The H. B. Claflin Company resisted the application for a receiver, and there was a hearing on the application, which resulted as stated.

The appellant contends that neither necessity nor ground for the appointment was shown. Section 3822 of the Code authorizes the appointment of a receiver "on the petition of either party to a civil action or proceeding, wherein he shows that he has a probable right to, or interest in any property which is the subject of the controversy, and that such property or its rents or profits, are in danger of being lost or materially injured or impaired, and the court, if satisfied that the interests of one or both parties will be thereby promoted, and the substantial rights of neither unduly infringed, may appoint a receiver to take charge of and control such property under its direction during the pendency of the action." The plaintiff acquired a valid interest in the property in controversy by virtue of its mortgage. Cobbey Chattel Mortgages, section 419, note 29. And

it has shown a right to and an interest in the property in controversy, within the meaning of the statute. Did  
3 the plaintiff show that the property or its profits were in danger of being lost or materially injured or impaired? The mortgage to the plaintiff in terms gave to it power to take possession of the mortgaged property, and sell it or so much thereof as should be necessary to pay the mortgage debt, in case of default in payment, or in case the mortgagor attempted to dispose of or remove the property from Polk county, or whenever the mortgagee should choose so to do. But the mortgage was subject to the levy made by the sheriff, and conferred no right to take the property from the sheriff until the levy should be discharged. There were liens for rent, and other liens upon the property; and the evidence shows that depreciation in the value of the property would have resulted, had the manufacturing been discontinued and the goods withdrawn from the market. It was the proper season for selling many of the goods when this action was commenced, and it was probable that, if their manufacture and sale were stopped, even for the time necessary to satisfy the execution and foreclose the mortgage to the plaintiff, goods which would otherwise have been sold would remain unsold during the season, and depreciate in value. The evidence also tended to show that much better prices would have been realized from retail sales by a receiver than could be obtained by sales in bulk under the execution or mortgage. Therefore, it appears that the plaintiff did not have an adequate remedy in the ordinary course of the law. This case is in many respects much like that of *Maish v. Bird*, 59 Iowa, 307, in which the appointment of a receiver was sustained. Whether a receiver should be appointed is usually a matter largely within the sound judicial discretion of the court or the judge asked to make the appointment. High Receivers, section 25; 3 Pomeroy Equity Jurisprudence, section 1331; 2 Story Equity Jurisprudence, sections 831, 832; *Hardware Co. v. Waibel*, 1 S. D. 448 (47 N. W. Rep. 814).

We are of the opinion that the interest of the plaintiff in the property in controversy was sufficient to authorize the appointment of a receiver, and that the evidence justified the district court in concluding that the plaintiff's interest was in danger of being impaired if the appointment were not made. An abuse of the discretion vested in the court is not shown, and its action is **AFFIRMED**.

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J. M. GOODENOW V. M. E. FOSTER and R. H. ALLEN, Appel-  
lants.

**Labor Lien: CHATTEL MORTGAGE: Priorities.** Under Acts Twenty-third General Assembly, chapter 43, providing that, when one's  
1 business is suspended by the action of creditors, debts owing to laborers shall be preferred, where a steam thrasher is seized, and the business of the owner is suspended, by the holder of a purchase-money mortgage, a claim of the engineer for labor performed after the execution and recording of the mortgage is a preferred claim.

**Judgment on Stipulation: WAIVER OF DEFECTIVE PETITION.** Where a stipulation provides that, if a demurrer to the answer is sus-  
2 tained, judgment shall be rendered for the plaintiff on the petition for the amount claimed, and the demurrer is sustained, defendant cannot question the sufficiency of the petition.

**JOINT DEFENDANTS.** In an action against a mortgagee of personalty and his agent to enforce preferred claims for labor, under Acts Twenty-third General Assembly, chapter 48, the petition alleged that the agent seized and sold the property, and received the proceeds, and that the claims were presented to him. A stipulation  
2 was made that, if a demurrer to defendant's answer was sustained, judgment should be rendered for plaintiff on the petition. *Held*, that judgment was properly rendered against both defendants.

*Appeal from Sac District Court.*—HON. S. M. ELWOOD,  
Judge.

MONDAY, MAY 22, 1899.

THIS appeal is by the defendants from a ruling sustaining plaintiff's demurrer to their answer, and the judgment rendered against them for want of further pleading.—*Affirmed.*

*W. A. Helsell* for appellants.

*R. M. Hunter* for appellee.

GIVEN, J.—I. The petition is in two counts, in substance as follows: The first alleges that between July 24 and October 13, 1896, the plaintiff performed work and labor for Herman Swanson, as engineer on a steam thresher, at two dollars per day, of which thresher Swanson was owner, and with which he was doing custom work, and that for said work there was a balance due to plaintiff of forty-one dollars and thirty-seven cents. In the second count he shows that there is due on a like claim seventy-six dollars and twenty-five cents for labor performed by Mel Wright as engineer on said thresher, and that said claim has been assigned to, and is the property of, the plaintiff. In each count he alleges that on October 13, 1896, said thresher was seized by the defendant Foster under a chattel mortgage executed thereon by Swanson to the defendant Allen, "and the business of said Swanson was suspended;" that on the twenty-first day of October, 1896, each of said claims, made out and verified as required by law, was presented by the claimants to said Foster; that on the twenty-third day of October, 1896, said Foster sold said property for six hundred dollars; that the costs were twenty dollars; that Allen knew said claims had been presented to Foster, and did not file any exceptions thereto; that Foster refused to pay said claims and turned over to Allen the proceeds of said sale, which Allen retains, and refuses to pay the plaintiff's claim. Plaintiff asked judgment for one hundred and seventeen dollars and sixty-two cents, with interest. Defendants answered without expressly

admitting or denying any of the allegations of the petition.

They alleged in substance as follows: That on the  
1 twenty-second day of June, 1896, Allen, as agent of  
the Aultman Company, sold the thresher to Swanson;  
that Swanson then executed a chattel mortgage on said prop-  
erty, to secure the purchase price, to the Aultman Company,  
which mortgage was recorded on the twenty-third day of  
July, 1896, long before the work and labor were commenced  
to be performed, and that said labor was performed with full  
knowledge of said mortgage; that subsequently the Aultman  
Company assigned its rights to Allen; that Swanson made  
default in the payment, and that Allen was compelled to fore-  
close said mortgage; that the defendant Foster has in no  
instance done more than to act as agent or employe of Allen  
in his foreclosure proceedings; that there has been at no  
time more in defendants' hands than enough to satisfy said  
mortgage. They allege that neither plaintiff nor Mel Wright  
has at any time filed with the defendant Allen any sworn  
statement of the labor claimed for, and that Allen did file his  
verified exceptions with Foster against the payment of said  
claims on the ground set out in this answer, which exceptions  
were served December 29, 1896. The defendants conclude  
their answer as follows: "Therefore defendants say that the  
lien of plaintiff, if any he have, is junior and inferior to  
defendant's lien under his said mortgage and for purchase  
money." Plaintiff enumerates several grounds in his  
demurrer, which may be summed up as presenting the ques-  
tion whether, by reason of the mortgage being prior in date  
and recording to the performing of the work and labor, is  
entitled to priority.

II. We have no argument for appellee. Counsel for  
appellants insist that this case is unlike *Reynolds v. Black*,  
91 Iowa, 1, for that in this case the labor was depreciating  
the property by use, while in that it was improving its  
value. It is insisted, for this reason, that the plaintiff is not  
within the provisions of chapter 48, Acts Twenty-third

General Assembly. It will be seen by what we have said of the answer that no such claim was made therein, and that the only defense set up was the claim that the lien of the plaintiff is junior and inferior to the lien under said mortgage. The answer does not deny the allegation that the business of Swanson was suspended by the seizure of the thrasher, and the statute does not limit the rights of the laborer to labor performed in the betterment of the property. Under the pleadings, and the holdings in *Reynolds v. Black, supra*, the appellants were not entitled to priority under the mortgage.

Appellants further contend that the judgment is erroneous for that the petition was not sufficient to entitle the plaintiff to judgment. Counsel quote from chapter 96, Acts Twenty-fifth General Assembly, "No pleading shall  
2 be held sufficient on account of a failure to demur thereto," and insist that the petition is insufficient to sustain the judgment. The case was taken under advisement, under a stipulation providing, among other things, "If the demurrer is sustained, judgment shall be rendered for the plaintiff without evidence, on the petition, for the amount claimed." We think this contention cannot be considered, in the face of the stipulation.

It is further insisted that the court erred in rendering a joint judgment, but in view of the stipulation, and the fact, as shown by the petition, that Foster seized and sold the property, received the proceeds, and was notified of  
3 plaintiff's claims by the same being presented to him, we conclude there was no error in rendering judgment against both defendants. Discovering no error in the record, the judgment is **AFFIRMED**.

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THEODORE STEINKE, T. P. DAVIS *et al.*, Appellants, v. J. C.  
YETZER *et al.*

**Trusts: POWER OF TRUSTEE.** A bank, being in urgent need of its resources to prevent a panic, its president, a large debtor, deeded to the bank certain land, the deed reciting that it was to secure  
1 all the depositors, and to be wholly and fully used to pay all debts  
2 of the bank, and he informed the public of the conveyance. *Held*, that the deed created a power in the trustee, in its discretion, to sell or mortgage the land, in whole or in part.

**INFORMAL EXECUTION.** The bank having quitclaimed the property to a third person, who executed mortgages thereon, and reconveyed  
3 the title to the bank, subject to the mortgages, its quitclaiming as owner, and not as trustee, was an informality which did not deprive the mortgagees of their rights to a lien.

**SAME: Intent to execute.** The bank having secured the proceeds of the mortgages, and applied them to its business, the depositors  
8 receiving the benefit, and, the title being restored to the bank  
5 subject to the mortgages, this showed an intention to execute the trust in part, though this was not revealed by the conveyances themselves.

**RATIFICATION** Any informality in the proceedings was ratified by the bank's keeping the money. and the depositors, since they  
4 claimed through the bank, had only its rights, and could not take advantage of the informality.

**DEPOSITORS: Mortgagees.** Conceding the depositors did not receive the benefit of the loans, the bank, as trustee, being empowered  
6 to create the liens, the mortgagees should be protected.

**AUTHORITY OF BANK OFFICERS.** Where the management of a bank's affairs is intrusted to the president and cashier, and they, with  
4 knowledge of the directors, have conveyed land at various times, a conveyance by them is not invalid because not authorized by the directors.

**Preference of Creditor: DEBTS OF BANK** One owning nearly one-half the stock of a bank, and being largely indebted to it, conveyed land to the bank in trust for the depositors. *Held*, that he had a  
7 legal right to prefer creditors of the bank over his own creditors and the doctrine applicable to partnerships, that individual assets should first be used to pay individual debts, did not apply.

*Appeal from Cass District Court.*—HON. N. W. MACY,  
Judge.

MONDAY, MAY 22, 1899.

THIS case, as we have it, is a consolidation of a number of actions, which were separately brought, but united and tried together in the district court. We shall state the facts as briefly as possible, out of which the controversy arose, so that the issues presented may be fully understood. The Cass County Bank was an incorporation engaged, as its name would indicate, in the banking business. J. C. Yetzer was its president, Isaac Dickerson vice president, and A. W. Dickerson cashier. On August 7, 1893, the bank was insolvent, though its condition was not known, outside of its officers and directors. The financial panic then prevailing

1       aroused fears on the part of depositors, and, to restore confidence, and prevent a speedy collapse of the institution, Yetzer on that day, his wife joining, made a deed to the bank of some one thousand five hundred acres of land and three town lots in Atlantic. This deed recited that it was made "for the purpose of securing all the depositors of the grantee, the Cass County Bank, and to be used for the purpose of paying all debts of the said Cass County Bank." Through Yetzer the public was informed of this conveyance. On November 17, 1893, the Cass County Bank, needing money to pay its debts and conduct its business, quitclaimed in three several instruments this real estate to Yetzer, who mortgaged part of it to the Security Loan & Trust Company to secure a loan of ten thousand dollars, a part to E. Huchendorf to secure a loan of six thousand dollars, and still another portion to Mrs. A. B. Crombie for two thousand dollars. Two of these deeds were executed in the name of the bank by J. C. Yetzer, president, and A. W. Dickerson, cashier, and the other, covering the land mortgaged to Huchendorf, by the vice president and cashier. All of this money was received and used by the Cass County Bank. Thereafter Yetzer and his wife deeded the land back to the bank, subject to these



mortgages. In December, 1893, the bank failed, and was placed in the hands of a receiver. Some time later the Cass County Bank was removed as trustee under the Yetzer deed by proper order of court, and the plaintiff Steinke appointed in its stead. The plaintiffs were depositors in the bank at the time of its failure, and they bring this action, asking that the real estate so conveyed by Yetzer be sold, and the proceeds applied ratably in payment of their debts. The Security Loan & Trust Company, E. Huchendorf, and F. H. Crombie, executor of the estate of A. C. Crombie, deceased, set up their respective mortgages as first liens on the property included therein, and by cross bills seek to foreclose the same. W. H. and W. J. Applegate were also made defendants in the action by Steinke, and by answer and cross bill they set up the fact that they are each judgment creditors of Yetzer; the judgment in favor of W. H. Applegate having been rendered in November, 1894, and that in favor of W. J. Applegate in May, 1897. They claim a prior right in said real estate, to the extent of their liens, as against all parties. Some further facts will be stated in the course of the opinion. The district court established the mortgages respectively, as first liens on the real estate in each described, and, subject thereto, confirmed the title of Steinke as trustee in all the land, and authorized him to sell the same for the benefit of depositors and creditors of the bank. Plaintiffs and W. H. and W. J. Applegate appeal.—*Affirmed.*

*J. B. Rockafellow and Willard & Willard* for Steinke and others.

*Curtis, Follett & Curtis* for W. H. and W. J. Applegate.

*Phelps & Temple and Carroll Wright* for Security Loan & Trust Company.

*John W. Scott* for F. H. Crombie and E. Huchendorf.

WATERMAN, J.—The main controversy pertains to the meaning to be given the trust clause in the deed from Yetzer and wife to the bank. It is insisted on the part of plaintiffs that no power of sale was given the bank, and that,  
2 even if such could be implied, 'it would not include the power to mortgage. The expressed object of the conveyance was "for the purpose of securing all of the depositors of the Cass County Bank, and to be wholly and fully used for the purpose of paying all the debts of the said Cass County Bank." When all of the circumstances are considered, the relation and situation of the parties, and that Yetzer made known to the public the fact of this conveyance, it seems impossible to resist the conclusion that he intended to vest in the trustee the power to execute the trust. No particular form of words is necessary to create a power to sell. Such power exists whenever it is apparent that it is necessary to carry out the purpose of the grantor. Perry on Trusts, section 766; Beach on Trusts, section 467. And we may say that a power to mortgage is sometimes implied in a power to sell. *Waterman v. Baldwin*, 68 Iowa, 255; *Pike v. Baldwin*, 68 Iowa, 263; *Loebenthal v. Raleigh*, 36 N. J. Eq. 169. But, in our opinion, the right expressly given in this case "to wholly and fully use" this property for the purpose mentioned is an expressed gift of the power to sell or mortgage, as the trustee might see fit. The trust here was coupled with an interest. Yetzer was a large debtor to the bank. The bank needed all of its resources at its immediate command to enable it to continue business. These considerations must be borne in mind when we attempt to construe what the grantors understood and intended the bank should do in the way of using this property. To say that it could only hold it subject to the claims of creditors is to deprive the word "use" of all significance whatever. See *Waterman v. Baldwin*, *supra*, in which the power included in the right "to dispose" of property is considered. It is said that the use made was but partial, and that, in any event, the bank must, if it used

the property at all, do so "wholly and fully." This is making these words a term of limitation. They should, in our opinion, be given just the opposite meaning. They are intended to take away any restriction on the trustee's right. It could use, and use to the fullest extent, the property, and the whole of it.

II. It is contended that, if there was a right to sell or mortgage, it could be done only as trustee, and the deeds made by the bank to Yetzer to enable him to make the mortgages, were not executed by it in that capacity. If  
3 the effect of the whole transaction was to create a lien which the bank had authority to give, it would certainly be inequitable to hold that the mortgagees should lose their rights because of an informality in the proceeding. This covers the point also that the mortgages were not executed by the bank, but by Yetzer.

III. Another ground of attack upon which plaintiffs rest is that the deeds to Yetzer were not authorized by the board of directors of the Cass County Bank. It is a fact that  
4 the matter was never brought up at any formal board meeting, for the board did not often meet. The management of the bank's affairs was intrusted to the president and cashier. These officers, with the knowledge of the directors, had so executed deeds of other real estate belonging to the bank before this time. It was the usual course of business as sanctioned or ratified by the directors. The deeds were therefore not invalid on this account. The bank is bound by the acts of these officers, done according to custom and usage; and third persons dealing with them under such circumstances, and having no knowledge of want of authority, are protected, even when authority is lacking. *Minor v. Bank*, 1 Pet. 46; *Mining Co. v. Anglo-Californian Bank*, 104 U. S. 192; *Foot v. Railroad Co.*, 32 Vt. 633; *Phillips v. Campbell* 43 N. Y. 271; *Whitaker v. Kilroy*, 70 Mich. 635 (38 N. W. Rep. 606).

IV. It may be admitted that in these conveyances nothing is said to indicate that the transactions were had for the purpose of carrying out the trust. But all the facts and circumstances show that this was the purpose of the parties. The bank was in sore need of money. The sum of eighteen thousand dollars was raised by the mortgages. The bank received it all. Plaintiffs had their share of the benefits, for there is no evidence that the bank lost any part of it in business. The title to the real estate was again placed in the trustee after the money was secured. There can be no conclusion reached but that the intention was to execute, in part, the trust, and every principle of equity requires that we sustain what was done. We may say further that if there was any informality of proceeding in these various transactions, the bank, by keeping the money received, has ratified what was done. *Eadie v. Ashbaugh*, 44 Iowa, 519; *Goodnow v. Stryker*, 61 Iowa, 261; *Milligan v. Davis*, 49 Iowa, 126-129. Appellants, claiming through the bank, have only its rights, for this is not a case where the act done by the trustee was something that it had no right to do under the power given. The most that can be said is that the bank had no right to raise the money in the manner it did; that is, by deeding to Yetzer, and having him execute the mortgage, instead of making such instrument itself. But this is matter of form only. If the bank is not in situation to complain, we do not see how plaintiffs can do so. Manifestly it would be unjust to give these appellants the land free and clear of incumbrance, and permit the bank to retain the money obtained on the mortgages also.

V. If we were to admit that plaintiff received no benefit from the funds procured on the mortgages, still, as we have found the trustee had a right to create such liens, we should have to say that the mortgage creditors should be protected. They were not obliged to see to the application of the money. They did not and could not know the debts of the bank. When they paid the money to the

trustee, their responsibility ceased. *Thomassen v. Van Wyn-gaarden*, 65 Iowa, 687; *Thompson v. Lambert*, 44 Iowa, 239; *Andrews v. Sparhawk*, 13 Pick. 393; *Norman v. Towne*, 130 Mass. 52; *Carrington v. Goddin*, 13 Grat. 587; *Conover v. Stothoff*, 38 N. J. Eq. 55.

VI. As to the issue raised by defendants Applegate, it appears that their judgments were obtained after the trust deed to the bank was executed, and after these mortgages were made. Yetzer was largely in debt to the bank when the deed was made, and the bank was indebted to its depositors. Yetzer was the owner of nearly one-half the capital stock of the bank, and on this account was liable for its debts.

The depositors were, in a sense, creditors of Yetzer.

7 He had a legal right to prefer them as he did. This principle is too well established to need citation of authorities in its support. But counsel for the Applegates seek to take their case out of that rule by invoking the doctrine applicable to co-partnerships, that, when there are firm debts and assets and individual debts and individual assets, the latter shall be first used to pay the individual debts. This is not a case for the application of that rule. There is no co-partnership here. The Applegates were not creditors of the bank, but of Yetzer alone. We see no reason for giving them priority over the mortgages or the claims of the depositors. Our conclusion is that the decree of the trial court must be AFFIRMED.

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NICHOLS & SHEPARD COMPANY, Appellant, v. LAVINA G.  
MARSHALL.

**Contracts: ENFORCEMENT: Law of sister state.** A contract of suretyship by a married woman domiciled in Iowa, made while temporarily in Indiana, cannot be enforced in Iowa, since, under the laws of Indiana (Burns' revised statute, section 6964) such a contract is void, and a contract void where executed cannot be enforced by the courts of Iowa.

*Appeal from Polk District Court.*—HON. T. F. STEVENSON,  
Judge.

MONDAY, MAY 22, 1899.

ACTION at law upon a promissory note signed by defendant as surety for Milton W. Gregory. The trial court sustained a demurrer to plaintiff's petition, and plaintiff appeals.—*Affirmed.*

*Berryhill & Henry* and *L. Ward Bannister* for appellant.

*C. C. & C. L. Nourse* for appellee.

DEEMER, J.—Defendant is a married woman domiciled in this state. On or about the ninth day of July, 1894, she signed the note in suit, in the state of Indiana, at which place she was temporarily visiting, as surety for Milton W. Gregory. The note was made payable at the Indiana National Bank of Indianapolis. The laws of Indiana (section 6964, Burns' Rev. St.) provide that "a married woman shall not enter into any contract of suretyship, whether as indorser, guarantor, or in any other manner; and such contract, as to her, shall be void." It is insisted on behalf of appellant that as defendant was domiciled in this state at the time she made the note, her capacity to contract followed her into the state of Indiana, and validated her contract made in that commonwealth, and that the right of a married woman to make a contract relates to her contractual capacity, and, when given by the law of the domicile, follows the person. Our statutes permit the making of contracts of suretyship by married women, and, if appellant's postulate be correct, it follows that plaintiff is entitled to recover. The general rule seems to be, however, that the validity, nature, obligation, and interpretation of contracts are to be governed by the *lex loci contractus aut actus*. *Savary v. Savary*, 3 Iowa, 272; *Boyd v. Ellis*, 11 Iowa, 97; *Arnold v. Potter*, 22 Iowa 194; *McDaniel*

*v. Railway Co.*, 24 Iowa, 417; *Burrows v. Stryker*, 47 Iowa, 477; *Bigelow v. Burnham*, 90 Iowa, 300. The rule is also well settled that personal status is to be determined by the *lex domicilii*. *Ross v. Ross*, 129 Mass. 243. Continental jurists have generally maintained that personal laws of the domicile, affecting the status and capacity of all inhabitants of a particular class, bind them, wherever they may go, and that the validity of all contracts, in so far as the capacity of the parties to contract is involved, depends upon the *lex domicilii*. Thus, the Code of Napoleon enacts, "The laws concerning the status and capacity of persons govern Frenchmen, even when residing in a foreign country." See, also, Story Conflict of Laws (8th ed.), sections 63-66; Wharton Conflict of Laws (2d ed.), section 114. Some of the English cases have also followed this rule. *Guepratte v. Young*, 4 De Gex & S. 217, 5 Eng. Ruling Cas. 848; *Sottomayor v. De Barros*, 47 Law J. Prob. 23, 5 Eng. Ruling Cas. 814. But see, apparently to the contrary, *Burrows v. Jemino*, 2 Strange, 733; *Heriz v. De Casa Riera*, 10 Law J. Ch. 47. We do not think the continental rule is applicable to our situation and condition. A state has the undoubted right to define the capacity or incapacity of its inhabitants, be they residents or temporary visitors; and in this country, where travel is so common, and business has so little regard for state lines, it is more just, as well as more convenient, to have regard to the laws of the place of contract, as a uniform rule operating on all contracts, and which the contracting parties may be presumed to have had in contemplation when making their contracts, than to require them, at their peril, to know the domicile of those with whom they deal, and to ascertain the law of that domicile, however remote, which in many cases could not be done without such delay as would greatly cripple the power of contracting abroad at all. Indeed, it is a rule of almost universal application that the law of the state where the contract is made and where it is to be performed enters into, and becomes a part of that contract, to the same

extent and with the same effect as if written into the contract at length. Each state must prescribe for itself who of its residents have capacity to contract, and what changes shall be made, if any, in the disabilities imposed by the common law. Thus, in *Thompson v. Kelchum*, 8 Johns. 192, the note was made in Jamaica. The defense was infancy, according to the laws of New York. It was determined that the transaction was subject to the laws of the place of contract, and that infancy was a defense, or not, according to the laws of Jamaica. Mr. Justice Story, in his commentaries on Conflict of Laws, says: "In regard to questions of minority or majority, competency or incompetency to marry, incapacities incident to coverture, guardianship, emancipation, and other personal qualities and disabilities, the law of the domicile of birth, or the law of any other acquired and fixed domicile, is not generally to govern, but the *lex loci contractus aut actus*, where the contract is made or the act done." Story, Conflict of Laws, sections 103, 241. See, also, 2 Kent Commentaries, 233, note; 2 Kent Commentaries, 458; 2 Kent Commentaries, 459, note. It will be observed that Chancellor Kent, in some passages of his text, seems to incline to the civilian doctrine, yet the notes clearly indicate that he concurs with Justice Story. See further, on this subject, Story Conflict of Laws (4th ed), sections 101, 102. The case of *Pearl v. Hansborough*, 9 Humph. 426, is almost exactly in point. In that case a married woman, domiciled with her husband in the state of Mississippi, by the law of which a purchase by a married woman was valid, and the property purchased went to her separate use, bought personal property in Tennessee, by the law of which married women were incapable of contracting. The contract was held void and unenforceable in Tennessee. See, also, *Male v. Roberts*, 3 Esp. 163; *Milliken v. Pratt*, 125 Mass. 374; *Carey v. Mackey*, 82 Me. 516, 17 Am. St. 500 (20 Atl. Rep. 84); *Baum v. Birchall*, 150 Pa. St. 164 (24 Atl. Rep. 620); 2 Parsons Contracts (8th ed.), \*574, note; 2 Parsons



Contracts, \*575-\*578. *Saul v. Creditors*, 5 Mart. (N. S.) 569, seems to be opposed to this rule. But as the case is from Louisiana, which state follows the civil law, it is not an authority. We may safely affirm, with Chancellor Kent, that while the continental jurists generally adopt the law of domicile, supposing it to come in conflict with the law of the place of contract, the English common law adopts the *lex loci contractus*. Lord Eldon, in *Male v. Roberts*, *supra*, said: "It appears from the evidence in this case that the cause of action arose in Scotland, and the contract must be therefore governed by the laws of that country, where the contract arises. Would infancy be a good defense by the laws of Scotland, had the action been commenced there? What the law of Scotland is with respect to the right of recovering against an infant for necessities, I cannot say; but, if the law of Scotland is that such a contract as the present could not be enforced against an infant, that should have been given in evidence, and I hold myself not warranted in saying that such a contract is void by the law of Scotland because it is void by the law of England. The law of the country where the contract arose must govern the contract, and what that law is should be given in evidence to me as a fact. No such evidence has been given, and I cannot take the fact of what that law is without evidence." It would seem, in this case, though not distinctly stated, that both parties were domiciled in England. The result of the application of these rules is that the contract was void where executed, and will not be enforced by the courts of this state.—AFFIRMED.

#### A. C. WHITE V. THE ELGIN CREAMERY COMPANY, Appellant.

**Contracts: PRINCIPAL AND AGENT.** Where the agent of a creamery company, which purchased the stock of another company, made a public statement of the terms on which the purchasing company would receive milk from the former patrons of the creamery, delivery of milk on the faith of such statement, if authorized, constituted a contract binding on the company.

**RATIFICATION.** Where the agent of a creamery company on taking charge of the creamery posted notices signed by the company, and one of its directors superintended the operation of the creamery, and daily reports were sent to the company on blanks furnished by it, and all butter shipments, with two exceptions, were made by the company as consignor to itself as consignee, and checks for the payment of its patrons who delivered milk on the faith of a proposition made by such agent were expressed by it to its servant at the creamery, such facts warranted a finding that the company operated the creamery, and hence ratified such proposition, though the same, when made, was not within the agent's authority.

**AUTHORITY OF PRESIDENT.** Where the president of a corporation owning a majority of the stock acquired the stock of a creamery company, which he testified was for the ultimate benefit of the corporation, and an agent of the corporation, authorized to lease creameries, made an agreement with the patrons of the creamery purchased, an instruction, in an action against the company on such agreement, that if the president authorized the agent to make it, or if the president, as such, subsequently ratified it, he would be presumed to be authorized to confer such authority, or ratify the agent's act, was not erroneous.

**SAME.** In the absence of any showing to the contrary, the president of a corporation will be presumed to have authority to act for it in all matters within the ordinary course of its business.

**CLAIMED AGENCY: Evidence.** Where the stockholders of a creamery company sold their stock either to S., or to the company, receipts given by stockholders, who did not surrender their certificates at the time, running to defendant, and not to S., and the statement by a person, who acted either for defendant or S. in the transfer, that he acted as agent for defendant, were admissible to show whether such agent claimed to act for S. or defendant.

**Exceptions to Instructions.** Where the transcript on appeal showed that both parties "excepted to each and every instruction given by the court to the jury," such statement, was a sufficient exception thereto, within Code, section 8707, providing that exceptions to the giving or refusal of instructions "may be noted by the reporter, and no reason for such exception need be given."

*Appeal from Union District Court.*—HON. W. H. TEDFORD,  
Judge.

MONDAY, MAY 22, 1899.

**ACTION** for the balance due on a contract to pay Elgin prices for butter made from milk furnished by the plaintiff

and one hundred and fifty-one others (who have assigned their claims to him), less four cents per pound for making and marketing. The defense was a general denial. Verdict and judgment for plaintiff, and defendant appeals.—*Affirmed.*

*D. A. Porter and Maxwell & Winter* for appellant.

*Sullivan & Sullivan* for appellee.

LADD, J.—The patrons of the creamery were paid at the rate of eight cents per pound for eighteen thousand one hundred and sixty-five pounds of butter fat, out of which were produced twenty-one thousand six hundred and fifty pounds of butter, for which they claim Mark Sands, as agent of the Elgin Creamery Company, agreed to pay Elgin prices, less four cents a pound for making and marketing. If correct, they were entitled to ten and a half cents per pound for their butter, instead of eight cents per pound for butter fat. That Mark Sands made such a proposition to some forty of the patrons was settled by the verdict. The stockholders of the Talmage Co-operative Creamery Company had just sold all their stock, through him, to Obediah Sands, or the defendant, and it was made with reference to future dealings  
1 with all the patrons of the factory. It was a public statement of the terms under which the management would receive milk, and we think that, if authorized by the company, delivery of milk by any one on the faith of it was an acceptance, and constituted a contract binding on the defendant.

II. The patrons certainly supposed they were dealing with the Elgin Creamery Company. On taking possession, Mark Sands hung out a notice, signed "The Elgin Creamery Company," assuring them of fair treatment. Howell, an agent and director of the defendant, directed the operation of the creamery. Daily reports of the amount of milk received

and butter made were sent to the defendant on blanks furnished, and instructions were given by it. It shipped  
2 a car of coal from Des Moines to itself at Talmage, which was used by this creamery. All the butter was shipped by the defendant as consignor and to it as consignee, except two shipments to another by its direction, and of each it required notice on one of its blanks. Even the checks, signed "Talmage Creamery Company, by O. Sands, Manager," for the payment of patrons, were expressed to the butter maker by the defendant. From these facts the jury might have found that the defendant operated the creamery during the month, and received all the butter made. If so, then it ratified the agreement of its agent, Mark Sands, even though this was not within the scope of his authority when made, as the milk was delivered on the faith of his proposition.

III. Exception was taken to the testimony of several witnesses to the effect that Mark Sands, in making the proposition to the patrons, stated that he did so as agent of the defendant. This could not be received as evidence  
3 that he was in fact the defendant's agent, but was admissible as showing in what capacity he claimed to act at the time of the proposition,—whether for the Elgin Creamery Company or for Obediah Sands. This is also true of the receipts running to the defendant, given by those present who did not have their certificates of stock with them.

IV. The appellee, in insisting that exceptions to the instructions had not been preserved, evidently overlooked the change in the statute. Section 3707 of the Code expressly provides that exceptions to the giving or refusal of  
4 instructions "may be noted by the shorthand reporter, and no reason for such exception need be given." See, also, as to preservation of same in bill of exceptions, Code, sections 3675. The transcript shows that the reporter did note that both parties "excepted to each and every instruction given by the court to the jury," thus confirming the correctness of appellant's abstract.

V. The court gave this instruction: "You are instructed that if O. Sands, as president of the defendant company, authorized Mark Sands to do what it is claimed that he did, or that O. Sands, as president of said defendant company, afterwards ratified what Mark Sands did, that you may presume that O. Sands, as president of defendant  
5 company, was authorized to confer authority on Mark Sands to make the contract claimed to have been made, or that it would be presumed that he had authority to ratify the same after it came to his knowledge." It appeared that Obediah Sands was president of the defendant company, and owner of eighty-three per cent. of the stock, and that Mark Sands had authority to lease creameries for the defendant. This instruction related to the contract for the butter made from the milk furnished, and not to the purchase of the stock in the Talmage Co-operative Creamery Company, as contended by appellant. The agreement, if made for the defendant, was exclusively for its benefit; and the instruction, when considered in connection with others given, could only have been construed to refer to acts of Obediah Sands in behalf of the company, rather than for himself individually. While not of a very satisfactory character, there was evidence warranting such an instruction. This president testified the ultimate object in acquiring the stock was for the defendant's benefit. A few days later, in selling it again, he did so on the condition of continuing his control of the creamery the remainder of the month. Besides, he knew of the management by the defendant, and gave directions in its name. But it is said that as president he was not presumed to have the authority stated. The law, however, seems to be well settled that, in the absence of any showing to the contrary, the president of a corporation will be presumed to have authority to act in all matters arising in the ordinary  
6 course of its business. As the head of the corporation, which, of necessity, must act through some agency, the natural inference is that he, as its presi-

dent, had been endowed with the power to direct its operation, and manage the transactions for which it was organized. *Patterson v. Robinson*, 116 N. Y. 193 (22 N. E. Rep. 372); *Steel Works v. Bresnahan*, 60 Mich. 332 (27 N. W. Rep. 524); *National State Bank of Terre Haute v. Vigo County National Bank*, 141 Ind. Sup. 352 (40 N. E. Rep. 800); *Town Co. v. Swigart*, 43 Kan. 292 (23 Pac. Rep. 569); *Getty v. Milling Co.*, 40 Kan. 281 (19 Pac. Rep. 617); *Road Co. v. Looney*, 1 Metc. (Ky.) 550 (71 Am. Dec. 491); *Blen v. Milling Co.*, 81 Am. Dec. 132; *Ceeder v. Lumber Co.*, 86 Mich. 541 (49 N. W. Rep. 575, 24 Am. St. 134); *Railroad Co. v. Coleman*, 18 Ill. 297 (68 Am. Dec. 544); *Smith v. Smith*, 62 Ill. 493; 1 Morawetz Private Corporations, 538. See Thompson Corporation, section 4613 *et seq.*; 17 Am. & Eng. Enc. Law, 124. The statute requiring publication of the articles is said to have modified this rule. Whether this be true as to domestic corporations, we do not determine. It does not relate to foreign corporations. It appeared that a part of defendant's ordinary business was the purchase of creamery products, which must necessarily have been accomplished through agents, and, if the president of the company did not have the authority imputed to him, the defendant should have so shown. In *Templin v. Railway Co.*, 73 Iowa, 548, and *Griffith v. Railroad Co.*, 74 Iowa, 85, the want of authority on the part of the president affirmatively appeared. We discover no error in the record, and the judgment is **AFFIRMED**.

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J. D. SEEBERGER V. JOHN WYMAN, Receiver, *et al.*

**Bonds Enforceable as Stay Bonds: VALIDITY.** A bond conditioned for  
1 the payment of the price of property sold by order of court, in  
such sums as the court may direct, and providing that, in case of  
2 default, it is to have the force and effect of a stay bond, and  
execution may issue against the obligors, is a valid obligation,

4 enforceable by an action, as the provision giving it the force  
of a stay bond, etc., applies only to the remedy, and is not, by its  
terms, made the exclusive remedy.

WHERE VOID IN PART. Whether such provision, giving it the force  
5 of a stay bond, is invalid, is immaterial, since, if invalid, it does  
not affect the remainder of the bond.

CONSTRUCTION. Where the obligation of a bond to a receiver is to  
pay whatever sums the court requires, not exceeding a specified  
10 amount, the receiver cannot complain of the refusal to allow him  
the full amount of the bond.

ATTORNEY FEES. An obligee, in an action on a bond, cannot have  
10 judgment for attorney's fees, where he failed to show that he is  
entitled thereto.

INDEMNITY TO SURETY: *Consideration*. An agreement to save a surety  
8 harmless, if he would execute a bond, made to induce the surety  
7 to sign, is not without consideration.

LAW PARTNERS AS OBLIGORS: *Scope of business*. An agreement by a  
partner in the name of his firm, engaged in the practice of law,  
7 to save a surety harmless if he would execute a bond in a case in  
8 which the firm was engaged, being outside the scope of the part-  
nership business, is not binding on a partner who did not authorize  
or ratify the signature.

EVIDENCE OF AUTHORIZATION BY PARTNER. A partner in a law firm  
executed an agreement, in the name of the firm, to indemnify a  
surety if he would execute bond in a case in which the firm was  
engaged. Another partner had control of the litigation, but  
testified that he did not know of the instrument until after it was  
8 given. The former testified that he obtained the surety at the  
latter's request, and that they discussed the matter before and  
after the security was given. The principal was unable to secure  
the bond, and applied to the firm to obtain it, and it was agreed  
that he would pay them to do so. *H. 44*, sufficient to charge such  
partners with liability.

RIGHT OF ACTION: *Judgment against surety*. A surety is not precluded  
from maintaining an action to ascertain the liability of others on  
9 an agreement to save him harmless, because no judgment had  
been rendered against him on his obligation, where, by the bond,  
his obligation was fixed by a judgment against his principal.

RELEASED BY APPEAL. A surety on a bond executed to a receiver, in  
an action for payment of such judgment as the court might  
6 direct, is not released by his principal taking an appeal, where he  
knew that the appeal was taken, and assented, thinking it might  
release him, and where it was not authorized or assented to by the  
receiver.

*Appeal from Polk District Court.*—HON. W. F. CONRAD,  
Judge.

MONDAY, MAY 22, 1899.

ACTION in equity to ascertain the liability of the plaintiff on a certain written instrument, to ascertain the liability of the defendants Cole, McVey, and Cheshire on another written instrument, and for other relief. There was a decree, from which all parties excepting Thomas A. Cheshire, R. F. Young, administrator, and Will Scoville, appeal. The record does not show the order in which the appeals were taken.—*Affirmed.*

*C. C. & C. L. Nourse* for J. D. Seeberger.

*Bowen & Brockett* for John Wyman.

*C. C. Cole* pro se.

*Thomas A. Cheshire* pro se.

ROBINSON, C. J.—The transactions out of which this action grew are as follows: Prior to September, 1890, Eliza Laing and Will Scoville were partners in the plumbing business. Eliza Laing died, and R. F. Young, as administrator of her estate, brought an action in the district court of Polk county for the settlement of the partnership affairs. In December, 1890, John Wyman was appointed receiver, with authority to take possession of the partnership property, and in the same month the district court authorized him to sell the  
1 property on terms stated as follows: "The purchaser will be required to pay twenty-five per cent. of purchase price in cash or certified check; and for the remaining seventy-five per cent., the purchaser will be required to give bond, with sureties to be approved by the court, for the payment of the balance of the purchase price, at such time as the  
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court shall hereafter order and direct, and bond will have the force and effect of a stay bond, upon which the court will order execution to issue in default of payment, in pursuance of its orders to be hereafter made." The property was sold to the surviving partner Scoville, one-fourth of the purchase price was paid by him, and a bond signed by himself as principal, and the plaintiff Seeberger and others as sureties, was given for the remainder. The bond was entitled as in the

case of the administrator against Scoville, and contained the following: "Whereas, an action was begun  
2 in this court at the September term, 1890, for settling partnership interests; and whereas, John Wyman, Esq., was appointed receiver of the partnership assets, and, upon order of the court, said assets were sold at public auction by said receiver, and Will Scoville, defendant herein, became the purchaser thereof for the sum of eight thousand two hundred and twenty-five dollars; and, whereas, the said Scoville has paid the said receiver on said purchase price the sum of two thousand and fifty-six dollars and twenty-five cents, and there now remains of said purchase price unpaid the sum of six thousand one hundred and sixty-eight dollars and seventy-five cents; and, whereas, a controversy has arisen between the plaintiff and the defendant as to the amount due and to be paid over by said Will Scoville on said purchase price: Know all men by these presents, that we, Will Scoville as principal, and J. D. Seeberger and W. H. Harwood as sureties, are held and firmly bound unto John Wyman, receiver in said cause, for the payment of the remainder of said purchase price, to-wit, six thousand one hundred and sixty-eight dollars and seventy-five cents, with interest at 6 per cent. from this date, which well and truly to be made we bind ourselves, our executors, heirs, and assigns, firmly by these presents. Sealed with our seal and dated this 16th day of January, 1891. Now, therefore, this bond is upon condition that, if the said Will Scoville shall, from time to time, pay whatever amounts the court shall order and require, and

in the manner as required by said court to be paid, not exceeding the sum six thousand one hundred and sixty-eight dollars and seventy-five cents, then this obligation shall be void and of no effect. But if the said Will Scoville shall fail to make payment as ordered by said court, not exceeding in the aggregate balance due on said purchase price and interest, then this bond to have the force and effect of a stay bond, upon which execution may issue against Will Scoville and his sureties as aforesaid, for the enforcement of the payment so ordered by this court; and the principal and sureties hereby agree to make payment according as the court shall direct, and, in case they fail to make the payments as ordered, then this bond shall have the force and effect of a stay bond, and execution may issue thereon against the said principal and the sureties aforesaid. Witness our hands this 10th day of January, A. D. 1891. Will Scoville. J. D. Seeberger, W. H. Harwood."

To induce the plaintiff to sign the bond, A. H. McVey, of the firm of Cole, McVey & Cheshire, gave to him a writing, of which the following is a copy: "Des Moines, Iowa, January 10, 1891. In consideration of J. D. Seeberger, Esq., having signed the bond of Will Scoville  
3 at our request, in the case of Young, Administrator, etc., vs. Scoville, we hereby agree to save said J. D. Seeberger, Esq., harmless from all liability of every kind on said bond, and by reason of having signed the same. Cole, McVey & Cheshire."

In May, 1893, the district court rendered judgment directing Scoville to pay the receiver the amount of six thousand one hundred and seventy-eight dollars and seventy-five cents, with interest thereon from the tenth day of January, 1891, at six per cent. per annum. An appeal to this court was taken by Scoville, a supersedeas bond in the sum of one thousand dollars was filed by him, and in October, 1896, the judgment was affirmed. See *Young v. Scoville*, 99 Iowa, 177. The judgment is unpaid, Scoville is insolvent, and

demand has been made of the plaintiff for the payment of the amount due.

The plaintiff alleges that Cole, McVey & Cheshire claim that there is a legal defense to the bond signed by him, and that they are not liable on the instrument delivered to the plaintiff by McVey. The plaintiff asks that Cole, McVey & Cheshire be required to make defense, if any there be, to the bond signed by him, and, if he is found to be liable thereon, that the amount be ascertained; that the liability of Cole, McVey & Cheshire on the instrument delivered by McVey be ascertained; and that a decree be rendered against them, with the right to an execution for all sums which he shall pay or be held liable for on account of the instrument he signed. General equitable relief is also asked. The defendant Wyman, as receiver, insists by answer that there is no defense to the bond signed by the plaintiff, and in a petition of intervention, which was treated as a cross petition, demands judgment thereon against the plaintiff, and against the defendants Scoville and Harwood. The answer of Judge Cole denies all liability on his part, and avers that the plaintiff is not liable on the bond signed by him. The answer of McVey alleges that the instrument delivered by him to the plaintiff was without consideration, and denies that there is any liability on account of it. The answer of Cheshire denies liability on his part, and alleges that the instrument delivered by McVey was unauthorized on the part of the firm of Cole, McVey & Cheshire, and denies that he ever assented to or ratified it. The answer of Harwood denies liability on the bond which he signed. Other matters are set out in different pleadings, but we do not find it necessary to refer to them.

The district court adjudged the bond signed by the plaintiff to be valid and binding as against all the persons who signed it, and rendered judgment thereon in favor of the receiver, Wyman, and against Scoville, the plaintiff, and Harwood for seven hundred and twenty-four dollars and ninety-five cents, that being the amount taxed against Scoville

as costs in the case of *Young v. Scoville*; and for four thousand five hundred and twenty dollars and seventy-two cents, that being the sum adjudged to be due the administrator, less one-half the costs. The district court further adjudged that Cole and McVey were liable on the instrument delivered by the latter, and judgment was rendered against them, and in favor of Seeberger, for the amount of recovery against him. The decree also contained other provisions, which need not be noticed.

I. It is contended that the bond signed by the plaintiff does not constitute an obligation which can be made the basis of an action against him. That claim is founded on the provision contained in the instrument to the effect

4       that, in case its signers fail to make the payment as ordered, then the bond should have the force and effect of a stay bond, upon which execution might issue. It is said that the only consequence which resulted from the failure to make the payments required by the order of the court was that for which the portions of the bond referred to provided,—that is, liability to an execution issued to enforce the order,—and that, if that provision of the bond was invalid, the signers of the bond are released from liability. Numerous authorities are cited to illustrate the familiar rule that “sureties and grantors are never chargeable beyond the strict terms of their engagement.” 1 Brandt Suretyship, section 93. That rule is not disputed in this case, and we are led to inquire as to the nature and scope of the bond which the plaintiff and Harwood signed. That it was designed to secure the payment of the sums which Scoville should be ordered and required to pay, not exceeding in the aggregate the balance specified in the bond, and interest, cannot be questioned. It “held and firmly bound” the sureties, as well as the principal, to pay those sums. The sentence, “and the principal and sureties hereby agree to make payment according as the court shall direct,” leaves no doubt as to the obligations of the sureties. The provision, in terms, giving

to the instrument the effect of a stay bond, and providing for the issuing of an execution thereon, merely related to the remedy in case of default, and was not, in terms nor by necessary implication, made the exclusive remedy. Although the surety has a right to stand upon the strict terms of his contract, the scope and effect of that contract are to be ascertained and determined according to the ordinary rules which apply to the interpretation of contracts. 1 Brandt Suretyship, section 92-94. When those rules are applied to the

5        bond in question, we do not think its intent and scope are doubtful. Whether the provisions giving to the bond the effect of a stay bond, upon which execution might issue, are valid, we do not need to determine. If not valid, they do not affect the validity of the remainder of the bond. They are clearly separable from the undertaking into which the signers of the bond entered. It was said in *U. S. v. Hodson*, 10 Wall. 395, that "it is a settled principle of law that where a bond contains conditions, some of which are legal and others are illegal, and they are severable and separable, the latter may be disregarded and the former enforced." See, also, *State v. Findley*, 10 Ohio, 51; *State v. Layton*, 4 Har. (Del.) 516; *Presbury v. Fisher*, 18 Mo. 50; Murfree Official Bonds, section 142; 4 Am. & Eng. Enc. Law (2d ed.) 676. It is claimed that the taking of an appeal in the case against Scoville had the effect to

6        release the sureties on the bond in question. The plaintiff knew that the appeal was taken, and evidently assented to it, thinking that it might result in releasing him from liability. A further objection to the claim is that action taken by Scoville alone, not authorized or assented to by the receiver or the administrator, would not release the sureties of Scoville. We conclude that the instrument signed by the plaintiff is valid as an obligation upon his part, and that an action thereon can be maintained.

II. We next consider the instrument delivered by McVey. The evidence shows that it was signed and delivered

pursuant to an agreement made by McVey to induce the plaintiff to sign the bond, and it is not, therefore, without consideration. Since it was signed and delivered by

7 McVey, it is clear that as to him it is valid. The

firm of Cole, McVey & Cheshire was organized to transact the business of practicing law, and it is not shown, nor is there anything in the record from which it can be presumed, that the execution of such instruments as that delivered to the plaintiff was within the scope of the partnership business, or in any manner authorized by all the members of the firm. The decided preponderance of the evidence shows that Cheshire did not authorize the execution of the instrument in the firm name, and that he did not at any time ratify it. As soon as he learned of it,—and that was several years after it was given, he refused to be bound by it. He did not at once notify the plaintiff that the instrument was unauthorized, but nothing transpired thereafter which estops Cheshire to assert his nonliability. He rendered a small amount of service in connection with the Scoville litigation, but there was nothing in the nature of what he did or learned to apprise him of the existence of the obligation to the plaintiff until he learned of it as we have stated. We conclude that he is not bound by it. The evidence in regard to the liability of Judge Cole is conflicting, and perhaps no conclusion in regard to it can be reached which would be entirely free from doubt. He states that he did not know

8 of the instrument until after the judgment against Scoville was affirmed by this court. But we

are of the opinion that a preponderance of the evidence shows that in this he errs. He had control of the litigation in which the obligation was given, and it was Mr. McVey's recollection that he obtained the plaintiff as surety at the request of Judge Cole, and that the matter of securing the plaintiff against loss was fully discussed with Judge Cole, both before and after the security was given. Scoville was unable to procure sureties, and applied to Cole,

McVey & Cheshire to obtain them, and it was agreed that he would pay the firm two hundred dollars to do so. In consequence of that agreement, the sureties were procured, and that amount was charged. After the judgment against Scoville was affirmed by this court, the plaintiff had several conversations with Judge Cole, in which the liability of the former was discussed, and in which the latter stated that he did not intend that the former should have any trouble on account of that liability. In one interview, Judge Cole proposed to see Harwood, McVey, and Cheshire, and have each one assume a part of the liability, and thus settle it, the amount which Judge Cole proposed to assume being about one thousand three hundred dollars. It is true that this proposition did not alone show that he recognized any liability to the plaintiff, and that his statements to the effect that he did not intend to permit the plaintiff to suffer by reason of his suretyship may have referred to the belief that Scoville would succeed in his litigation. But when Judge Cole's relation to that litigation is considered, his responsibility for the protection of Scoville's rights, and his belief that he ought to succeed in his defense, the necessity for procuring a sufficient bond, the charge made for it, the testimony of McVey and the plaintiff, and other, although less direct, evidence, to which we have not referred, lead us to the conclusion that Judge Cole knew of and authorized, on his part, the execution of the instrument to the plaintiff, even though the fact has escaped his recollection, and that he is bound by it.

III. It is next contended that the plaintiff has no right to maintain this action before judgment is rendered against him on his obligation. By the terms of the obligation, the liability of the obligors was to be fixed by the order  
9 of the court requiring payment by Scoville. It was said in *Wilson v. Smith*, 23 Iowa, 252, that, where a bond is conditioned to save the obligee from damages, no right of action accrues thereon until the obligee, by the payment of the judgment or some part thereof, has been dam-

aged. Judgment has not been rendered against the plaintiff in this case, and he has not paid anything on the judgment rendered against Scoville, but his liability was fixed, under the terms of his obligation, by that judgment. As this is an action in equity, the power exists, not only to ascertain and determine the liability of the parties to the two obligations in controversy, but also to render such a decree as will protect and enforce the respective rights of all parties to the action, including the rendering of judgment in favor of the plaintiff. *Burroughs v. McNeil*, 22 N. C. 297; *Daniel v. Joyner*, 38 N. C. 520; *Chace v. Hinman*, 8 Wend. 452; *Conner v. Reeves*, 103 N. Y. App. 527 (9 N. E. Rep. 439). We are of the opinion that the plaintiff has shown himself entitled to the relief he asks against Cole and McVey.

IV. The receiver, Wyman, complains of the refusal of the district court to allow him the full amount of the obligation signed by the plaintiff and others, with interest thereon from its date, but fails to show that his complaint  
10 is well founded. The undertaking of the obligors was to pay whatever sums the court should require of Scoville, not exceeding the amount specified. *Kuhn v. Myers*, 37 Iowa, 351. The receiver also claims an allowance for attorney's fees, but fails to show that he is entitled to it. *Newell v. Sanford*, 13 Iowa, 463. We have examined this case with much care, but without finding reversible error in any matter of which the parties appealing complain in argument. The bond signed by the plaintiff and Harwood authorized judgment against them for the amount, including costs, taxed to Scoville, for which the decree of the district court provides. The decree appears to be right and is **AFFIRMED**.



108	538
114	740
108	538
119	185
119	186
108	538
128	82

SIOUX CITY VINEGAR MANUFACTURING COMPANY, Appellant,  
v. J. F. BODDY, A. R. MOLYNEAUX, CLARENCE A.  
PLANK, and MOLYNEAUX & PLANK.

108	538
137	630
108	538
140	397

**New Trial: CASUALTY AND MISFORTUNE** A new trial will not be granted on the ground that judgment by default was rendered by unavoidable casualty or misfortune, within Code, section 4091, where the secretary of defendant corporation, not charged with the management of its affairs, on being served with notice of suit, placed it in a receptacle in his office, in order to have a member of the law firm of which he was also a member prepare an answer, which notice was by him misplaced without mentioning the action to any one, or giving it any further attention.

*Appeal from Woodbury District Court.*—HON. JOHN F. OLIVER, Judge.

TUESDAY, MAY 23, 1899.

THE demurrer to the petition for new trial was sustained; and, as the plaintiff elected to stand on the ruling, the petition was dismissed, and it appeals.—*Affirmed.*

*Swan, Lawrence & Swan* for appellant.

*A. R. Molyneux* and *C. A. Plank* for appellees.

LADD, J.—In Boddy against the Sioux City Vinegar Manufacturing Company, judgment by default was entered against the defendant at the September, 1897, term of court; and, after its close, this petition for new trial, on the ground of unavoidable casualty or misfortune, preventing the company from defending, was filed. The demurrer, among other things, questioned the sufficiency of the facts alleged to constitute such casualty or misfortune as is contemplated by the statute. Code, section 4091. The original notice was served on the secretary of the corporation, who was not charged with

any part in the management of its affairs, and the pendency of the action was unknown to any one else connected with it. This secretary was also a member of a law firm, though he did nothing in the preparation of pleadings or trials of litigated cases. Having a general knowledge that the claim was disputed, and that the company had a defense, he placed the notice in a box or receptacle in the law office of his firm, for the purpose of having one of his partners prepare the defense, draw the answer and appear in the cause in behalf of the defendant. Through some oversight or accident the notice was misplaced by the secretary, and the attention of neither of the other members of the firm was called to it until after the rendition of the judgment. While the members of the firm other than the secretary left for distant points a few days after the notice was served, it does not appear that he was called away. It is not alleged that, from the mere placing of the notice in the box or receptacle, the other members of the firm would understand, from the usage of the office, that the firm was employed, or what was to be done. Besides, if an answer were to be prepared, something more than the mere handing of notice was essential, and this we must presume, was known to the secretary, who was an attorney. He knew he had not been called on for the necessary information by the other members of the firm, and, as they left shortly after the service of notice, he was in charge of the office, and gave the matter no attention. Whether the firm was retained by the company, or he was authorized to employ counsel, does not appear. As he was charged with no part in the management of its affairs, it would seem he could not employ counsel. We have a case, then, of the secretary of a corporation, not charged with the management of its affairs, who, being served with an original notice, tossed it in a receptacle for the purpose of having a member of a law firm of which he was also a member prepare an answer and defend, which notice was by him misplaced by oversight, without mentioning the action to anyone, or giving it the slightest attention. That there

was no unavoidable casualty or misfortune appears from the bare statement of the facts. It was rather a case where the officer on whom notice was served forgot or neglected to give the matter any proper attention. That under such circumstances relief cannot be had is well settled. *Insurance Co. v. Rodecker*, 47 Iowa, 165; *Grove v. Bush*, 86 Iowa, 98; *Church v. Lacey*, 102 Iowa, 238; *Jones v. Leach*, 46 Iowa, 187; *Mogelberg v. Clevinger*, 93 Iowa, 736.—AFFIRMED.

LUELLA HEACOCK v. J. J. HEACOCK, Appellant.

**Husband and Wife: PERSONAL SUITS BETWEEN.** A wife cannot sue a  
 1 husband on his personal contract, such as a note made him to her  
 2 as payee, during coverture, under Code 1873, section 2304, authoriz-  
 3 ing an action against him to protect her property, or sections  
 2211 and 2213, which in general terms authorize married women  
 to sue as if unmarried.

**SAME.** Code 1873, section 2211, providing that a wife may receive  
 1 wages for her own labor, and sue therefor, and prosecute all  
 2 actions for the protection of her rights and property, as if un-  
 4 married, gives the wife no right of action as against her husband.

**SAME.** Power to contract with her husband is not given by bestowing  
 1 upon a married women the power to make and enforce contracts  
 2 to the same extent as if sole, since the husband's disabilities must  
 also be removed, before a contract with him can be valid.

**PLEA AND PROOF.** In an action against her husband upon contract,  
 5 plaintiff must both allege and prove that the contract is authorized,  
 as that the matter in controversy relates to her separate estate,  
 because her capacity to contract with him is deemed exceptional.

ROBINSON, C. J. dissenting.

*Appeal from Plymouth District Court.*—HON. JOHN F.  
 OLIVER, Judge.

TUESDAY, MAY 23, 1899.

**ACTION** at law to recover an amount alleged to be due  
 as interest on an instrument in writing. A demurrer to  
 the petition was overruled, and, the defendant refusing to

108	540
119	726
119	727
108	540
125	232
108	540
140	739

plead further, judgment was rendered in favor of the plaintiff for the amount claimed. The defendant appeals.—*Reversed.*

*J. M. Wormley and I. S. Struble* for appellant.

*Ira T. Martin* for appellee.

DEEMER, J.—A copy of the instrument upon which this action was brought is as follows: "1,000.00. Kingsley, Io., May 20, 1893. I promise to pay Luella Heacock (my wife) one thousand dollars, value received, with interest thereon at the rate of 6 per cent. per annum, payable annually. This note becomes due at my death, and to be paid her out of the estate, aside from her lawful dowry. In case of her death before mine, this note becomes void. Should any of the interest not be paid when due, it shall bear interest at the rate of 6 per cent. per annum. It is also stipulated that, should the collection of this note be enforced by law, a reasonable amount shall be allowed as attorney's fees, and taxed with the costs in the cause. [Signed] J. J. Heacock." The plaintiff admits the payment on the instrument of twenty-five dollars as interest, and seeks to recover one hundred and sixty-seven dollars and ninety-two cents as interest due December 8, 1896, and unpaid, and interest on that sum.

The first ground of the demurrer is that the petition does not show that the plaintiff can maintain this action, for that she is the wife of the defendant, and it is not shown that the instrument sued on was given for money loaned by  
1 the plaintiff to the defendant, or for property of the plaintiff, the possession or control of which had been obtained by the defendant. While the legislature of this state has made many and very radical changes in the common law relating to husband and wife, yet it is a serious mistake to assume that the legal unity or oneness of husband and wife has been entirely obliterated by our statutes. Indeed, there is no state that has gone to such an extent. *McKee v. Reynolds*,

26 Iowa, 582; *Jones v. Crossthwaite*, 17 Iowa, 393. A wife cannot, in the absence of express agreement, recover money of hers spent by her husband for the use of the family, or to promote his business. *Patterson v. Hill*, 61 Iowa, 537; *Hanson v. Manley*, 72 Iowa, 51; *Courtright v. Courtright*, 53 Iowa, 57. The husband owes his wife nothing for services performed by her. *Grant v. Green*, 41 Iowa, 88; *Van Doran v. Marden*, 48 Iowa, 188. The wife's time, outside of her separate business, belongs to her husband. *Miller v. Dickinson County*, 68 Iowa, 102; *Lyle v. Gray*, 47 Iowa, 154; *Fleming v. Town of Shenandoah*, 67 Iowa, 508. The husband's creditors may take all that his wife accumulates outside her separate business. *Hamill v. Henry*, 69 Iowa, 752. Husband and wife cannot contract with each other to secure the performance of their marital rights and duties. *Miller v. Miller*, 78 Iowa, 177. The law presumes that the influence of the husband over his wife is such that she is not held criminally liable for acts done by her in his presence. *State v. Kelly*, 74 Iowa, 589. And the husband is under obligations to support his wife, and is entitled to her earnings. *Thill v. Pohlman*, 76 Iowa, 638; *Tibbetts v. Wadden*, 94 Iowa, 173; *Rafferty v. Buckman*, 46 Iowa, 201; *Porter v. Briggs*, 38 Iowa, 166. In the case of *Peters v. Peters*, 42 Iowa, 182, it is expressly held that neither the husband nor the wife can sue the other for a tort committed during coverture. This same conclusion has been reached by other courts in construing similar statutes. *Libby v. Berry*, 74 Me. 286; *Barton v. Barton*, 32 Md. 214; *Freethy v. Freethy*, 42 Barb. 641; *Schultz v. Schultz*, 89 N. Y. 644. These cases teach the following doctrines: First, that the legal fiction of the oneness of husband and wife has not been entirely effaced; and, second, that all disabilities which the common law imposes upon husband and wife by reason of the marriage status still exist, except in so far as they have been modified or changed by express statutory enactment. As sustaining these conclusions, see, also, *Robertson v. Bruner*, 24 Miss. 242; *May v. May*, 9 Neb. 16 (2 N. W. Rep. 221);

*Diver v. Diver*, 56 Pa. St. 109; *Bertles v. Nunan*, 92 N. Y. 159. Now, at common law neither the husband nor wife could sue the other at law nor could they enter into contracts with each other. Public policy, originating in the delicate relation existing between husband and wife, forbade the wife from maintaining an action at law against her husband. *Barton v. Barton*, *supra*; *Russ v. George*, 45 N. H. 467; *Powers v. Lester*, 23 N. Y. 527. Contracts between them were void because of defect of parties, and both husband and wife labored under the disability. *Aultman v. Obermeyer*, 6 Neb. 260; *White v. Wager*, 25 N. Y. 328.

Have these disabilities been removed by our statutes, and, if so, to what extent? And first as to the right to sue: The only sections giving the wife a right of action against her husband are section 2204 and 2211 of the Code of 1873, which read as follows:

"Sec. 2204. Should either the husband or wife obtain possession or control of property belonging to the other, either before or after marriage, the owner of the property  
2        may maintain an action therefor, or for any right growing out of the same, in the same manner and extent as if they were unmarried."

"Sec. 2211. A wife may receive the wages of her personal labor and maintain an action therefor in her own name, and hold the same in her own right; and she may prosecute and defend all actions at law or in equity for the preservation and protection of her rights and property, as if unmarried."

In construing these sections, Judge Day, speaking for the court in the *Peters Case*, *supra*, said: Whilst it must be admitted that very radical changes have been made in the relation of husband and wife, still it seems to us that these changes do not yet reach the extent of allowing either husband or wife to sue the other for personal injury committed during coverture. \* \* \* It is evident that section 2211 refers to and authorizes actions against parties other than the husband; for, if this section allows an action generally against

the husband, it covers and embraces more than is included in section 2204, and that section is rendered useless and meaningless. Whatever right of action exists against the husband must therefore be found in section 2204. This section is limited to actions for property, or rights growing out of the same." The holding in that case has never been questioned, and it seems to us it firmly establishes the doctrine that the wife has no right of action against her husband, unless it be for the preservation or protection of her separate property. See, as further sustaining these conclusions, *Chestnut v. Chestnut*, 77 Ill. 346; *Jenne v. Marble*, 37 Mich. 319; *Pittman v. Pittman*, 4 Or. 298. If she has no right to sue,—no remedy,—she has no right. *Broom Legal Maxims* (8th ed.), p. 191, and cases cited; *Abby v. White*, 2 Id. Raym. 953; *Howe v. Wildes*, 34 Me. 566; *People v. Dikeman*, 7 How. Prac. 130. As she has no remedy against her husband, unless it be for the infraction of some of her property rights, she cannot sue him on his personal contract.

This ought to end the case, but, as reliance is placed upon section 2213 of the Code of 1873, it is perhaps well to consider that section. It reads as follows: "Contracts may be made by a wife and liabilities incurred, and the  
3 the same enforced by or against her to the same extent and in the manner as if she were unmarried." It is said that this section authorizes any kind of contracts between husband and wife. We do not think so. Both husband and wife were under such legal disabilities at common law as that they could not contract with each other. To remove the disability of one will not validate the contract, for one of the contracting parties has no assenting mind; and it would be strange doctrine to announce that, because the disability was removed from one of the contracting parties, the contract is good, although the other is without a concurring mind. The statute undoubtedly has reference to contracts with persons other than her husband; for, as said by Denio, J., in the case of *White v. Wager*, 25 N. Y. 328: "No doubt, there

was an intention to confer upon the wife the legal capacity of a *feme sole*, in respect to conveyances of her property, but this does not prove that she can convey to her husband, for no such question could possibly arise in respect to a *feme sole*; there being no person to whom, in respect to conveyance made by her, the rule of the common law could apply. But, assimilating the case of a wife to that of an unmarried woman, the legislature merely meant to say that she should have the same power as though she were not under the disability of coverture. Taking away that disability, she would have power to make all such conveyances as were not forbidden by special provision of law; but such general statutes are never understood to overreach particular prohibitions, founded on special reasons of policy or convenience. Corporations cannot, in general, take title to lands by will. The removing of the disability of *femes covert* would not allow them to make a devise to a corporation not authorized to take. It is not the disability of the wife alone which would, by the common law, render void her conveyance to her husband. The husband is as much disabled to take under such a conveyance as she was to convey. Therefore, to render the conveyance valid, the husband's disability, as well as that of his wife, must be removed; but, as has been remarked, there is no language in these acts, and nothing in their apparent intention, which looks to the removal of any disabilities under which he labored." That case was cited with approval by this court in *McKee v. Reynolds* and *Jones v. Crosthwaite*, *supra*, and we think the reasoning is unanswerable. See, as sustaining the same doctrine, *Aultman v. Obermeyer*, 6 Neb. 260; *Lord v. Parker*, 3 Allen, 127; *Savage v. O'Neil*, 42 Barb. 374; *Hoker v. Boggs*, 63 Ill. 161; *Knowles v. Hull*, 99 Mass. 562; *Roop v. Real Estate Co.*, 132 Pa. Sup. 496 (19 Atl. Rep. 278), 7 Lwy. Rep. Ann. 211; *Roby v. Phelon*, 118 Mass. 542. There are cases holding to the contrary, but they all seem to be based on an assumed legislative intent. If it were the intent of the legislature of this state

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to permit married women to contract with and sue their husbands, such intent could be clearly expressed in a very few lines. That such course was not pursued is the best evidence that this was not the intent of the general assembly. Moreover, we can only arrive at the legislative intent by construing the language used in the light of previous decisions, and of the well-settled rules of construction. Applying these rules and decisions, we think it is clear that married women can only contract with and sue their husbands in matters relating to her separate estate. Consideration of all the statutes heretofore set out inevitably leads us to the conclusion that this was the intent of the legislature. The Code of 1897 contains the identical sections to which we have referred, without change. They were passed with the *Peters Case* in mind, and it is evident that the legislature considered that case a correct exposition of the statutes as they had theretofore existed, and re-enacted the statutes with that in view.

We have not referred to the statutes relating to a married woman's separate property, and her right to her real and personal property, for it is uniformly held that such statutes do not give the right to a married woman to  
4 personally contract with her husband. *Jenne v. Marble*, *supra*; *Albion v. Lord*, 39 N. H. 196; *Ballin v. Dallaye*, 37 N. Y. 35; *Norris v. Lantz*, 18 Md. 280; *O'Daely v. Morris*, 31 Ind. 111; *Pond v. Carpenter*, 12 Minn. 430 (Gil. 315); *Ames v. Foster*, 42 N. H. 381. There is no conflict in the authorities on this proposition. Hence consideration of the statutes relating to these matters would be useless.

As the contract in suit is invalid and cannot be enforced unless it relates to the wife's separate estate, the burden is on plaintiff to both plead and prove that fact. The cases  
5 all hold that the common-law rules, although for the greater part done away with by equity and by statute, still so far exist that any capacity of married women to contract is regarded as exceptional, and the grounds there-

for must be both alleged and proved by one seeking to recover. *Hinkson v. Williams*, 41 N. J. Law 35; *Stillwell v. Adams*, 29 Ark. 346; *Way v. Peck*, 47 Conn. 23; *Tracy v. Keith*, 11 Allen, 214; *West v. Laraway*, 28 Mich. 464; *Pollen v. James*, 45 Miss. 129; *Nash v. Mitchell*, 71 N. Y. 199. In the case of *Rodemeyer v. Rodman*, 5 Iowa, 426, we held, in effect, that, *prima facie*, a married woman is still unable to contract, to sue or be sued, and that, when she seeks to recover, she must plead the exception which allows her to recover. But it is said that the law presumes a consideration for the note, and that this presumption is sufficient. It is true that all contracts in writing, signed by the party to be bound, import a consideration. Code 1873, section 2113. But this statute was enacted for the purpose of giving to instruments in writing the same effect as instruments under seal had at common law, and not to supply proof that the contract was based upon a particular consideration. In effect, it simply dispenses with proof that a written instrument was based on a consideration. 1 Parsons Contract (8th ed.) p. 441, and note u; 2 Smith Lead. Cas. 456. If there could be no other consideration for the instrument in suit than the wife's separate property, then this presumption might avail her. But it is evident there may have been other considerations which were perfectly valid, and which would have supported the note had it been in the hands of a third person. As no particular consideration is presumed, the burden is upon the wife to show that the contract was with reference to her separate estate. This is, in effect, the holding in the case of *Logan v. Hall*, 19 Iowa, 491. In that case plaintiff proved that the note was given for her separate estate. We are firmly of the opinion that the petition does not state a cause of action, and that the judgment should be REVERSED.

ROBINSON, C. J.—I do not concur in the opinion of the majority. A careful examination of the cases cited in its support will show, as I believe, that very few of them have

any application to the question actually presented by the demurrer. Some of them are based upon the common law, and some upon modifications of the common law, which differ widely in different states. The changes from the common law are so diverse that the value of decisions rendered by courts of other states, as aids in interpreting the law of this state, can only be determined when the statutes under which such decisions were rendered are known. In but few of the states are married women so fully relieved of the disabilities and restrictions imposed by the common law as they are in this state, and in but few are the powers of the husband and wife to contract with each other so great. Some of the most important changes from the common law were made in this state as late as the year 1873. There are some matters in regard to which the husband and wife cannot make valid contracts with each other. They include those specified in section 3154 of the Code, and the performance of duties growing out of the marital relation and matters which public policy require should not be made the subject of contract between husband and wife. For example, it is ordinarily the duty of the husband and wife to live together in peace and harmony, and for each to avoid so far as possible with reasonable effort, the giving of offense to the other; for the husband to provide for the family, and for the wife to attend to the household duties. An agreement that each should perform the duties required by the marriage relation, when neither had valid reason for doing otherwise, would be against public policy, and not enforceable. *Miller v. Miller*, 78 Iowa, 177. A contract between husband and wife to enable one to obtain from the other a divorce without a legal cause would be illegal. *Pearson v. Cummings*, 28 Iowa, 344. And since it is the settled law of the state that the husband is entitled to the companionship of his wife, and to her services in performing household and family duties, a contract that she should live with him and perform such services would, in the absence of exceptional conditions, be without considera-

tion, and not enforceable, for that reason. *Owen v. Owen*, 22 Iowa, 270. See, also, *Hall v. Incorporated Town of Manson*, 90 Iowa, 585; *Nichols v. Railway Co.*, 68 Iowa, 732; *Mewhirter v. Hatten*, 42 Iowa, 288; *Trust Co. v. Chapin*, 106 Mich. 384 (64 N. W. Rep. 334). But the statutes of this state authorize contracts between husband and wife in regard to most subjects concerning which persons not standing in that relation have occasion to contract. Among such contracts are those which relate to conveyances and transfers of property, and the many rights which may be incident to the exercise of such powers. Code, section 3157. Husband and wife may contract for the loan of money by one to the other. *Logan v. Hall*, 19 Iowa, 491; *Jones v. Jones*, 19 Iowa, 236; *Wright v. Wright*, 16 Iowa, 496; *Blake v. Blake*, 7 Iowa, 46; *In re Alexander*, 37 Iowa, 454; *Doyle v. McGuire*, 38 Iowa, 410; *Gilbert v. Glenny*, 75 Iowa, 513; *Payne v. Wilson*, 76 Iowa, 377. And the wife is liable on the promissory note of her husband, signed by her, although she signed it and the mortgage which secured it merely to release her right of dower in the mortgaged premises. *Wood v. Dunham*, 105 Iowa, 701. In *Carse v. Reticker*, 95 Iowa, 25, this court sustained a contract by which a husband agreed to let his wife have all the profits which should accrue from boarding prisoners in his charge as sheriff. See *Hoag v. Martin*, 80 Iowa, 714; *Nuding v. Ulrich*, 169 Pa. St. 289 (32 Atl. Rep. 409). A husband or wife may constitute the other an agent to control and dispose of property for their mutual benefit. Code 1873, section 2210; *Johnson v. Grimmering*, 83 Iowa, 10; *Taylor v. Wands*, 55 N. J. Eq. 491 (37 Atl. Rep. 315); *Bank v. Guenther*, 123 N. Y. 568 (25 N. E. Rep. 986). And it has been held in several states, although disputed in others, that husband and wife may carry on business together as partners. *Railroad Co. v. Alexander* (Ky.), 27 S. W. Rep. 981; *Belser v. Banking Co.*, 105 Ala. 514 (17 South Rep. 40); *Lane v. Bishop*, 65 Vt. 577 (27 Atl. Rep. 499); *Burney*

*v. Grocery Co.*, 98 Ga. 711 (25 S. E. Rep. 915). It was said in *Hanson v. Manley*, 72 Iowa, 48, that married women, under the statutes of this state, "can hold and manage and control personal property to the same extent as though single. They can contract with reference to it, even with their husbands, and maintain actions in their own names for the enforcement of their contracts with reference thereto." The wife may have an occupation independent of her husband, and recover for injuries which impair her power to follow that occupation. *Fleming v. Town of Shenandoah*, 67 Iowa, 505. It would be difficult, if not impossible, to enumerate all cases in which the husband and wife have the power to contract with each other. But, in my opinion, the Code of 1873 gave to husband and wife power to make such contracts in so many cases, involving so many different subjects, that, as a general rule, the power exists, and the cases in which it is lacking are exceptional. If that be true, it was not necessary for the petition to show that the note in suit was given for a purpose authorized by law, but, if it was not given for such a purpose, the fact could have been pleaded and shown as a defense. Since husband and wife are competent to contract with each other, in my opinion it should be presumed in the first instance that their contracts are valid. Certainly, if it be true, as stated in *Association v. Stenger*, 54 Neb. 427 (74 N. W. Rep. 846), that the husband, with possibly a few exceptions, is the dominant person, there should not be a presumption in his favor that his contract with his wife is void. See *Tillaux v. Tillaux*, 115 Cal. 663 (47 Pac. Rep. 691). It is the rule in Nebraska that: "When a married woman sets up her coverture to avoid liability on her contracts, she must, in her answer, negative all causes from which otherwise her liability may be inferred. \* \* \* The reason is that her nonliability can only arise from her inability to contract, and this she must clearly allege." *Gillespie v. Smith*, 20 Neb. 455 (30 N. W. Rep. 526); *Bank v. Coffman*, 101 Iowa, 594. The case of *Chris-*

*tensen v. Wells*, 52 S. C. 497 (30 S. E. Rep. 611), is to the same effect. As the contract in suit is in writing, and signed by the defendant, a consideration is presumed. Code 1873, section 2113; Code, section 3069. And if, as I contend, the power of husband and wife to contract with each other is general, and the lack of that power exceptional, the rule of the cases which hold that when an action is based upon a right or obligation which is exceptional under the common law, it is necessary for the petition to show that the action is within the exception, does not apply. Where the limitations and disabilities imposed by the common law are made exceptional by the statute, the reason for the rule ceases to exist, and the rule should not be applied. Whether a wife can have a right of action against her husband in this state, unless it be for the preservation or protection of her separate property, is a question which does not seem to me to be involved in this appeal, and I do not express any opinion in regard to it. The statement of the majority to the effect that the plaintiff has no right, because she has no remedy, so far as shown, may well be considered in connection with the well known fact that courts are apt to find a remedy where there is a right. See *Logan v. Hall*, 19 Iowa, 491; *Owen v. Owen*, 22 Iowa, 270. It is my opinion that the petition stated a cause of action, that the demurrer was properly overruled, and that the judgment of the district court should be AFFIRMED.

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MEREDITH, DICKEY & COMPANY, Appellants, v. PETERSON.

**Execution: REDEMPTION BETWEEN LIEN HOLDERS.** A junior lienor redeeming from an execution sale under the Code of 1873, sections  
2 3109, 3114, 3115, must file the statement of the utmost amount he is willing to credit on his lien within the ten days given by the statute, or be held to have accepted the property in complete satisfaction of his debt.

SAME. It is of no avail that the junior lienor told the clerk at the  
3 time of the transaction that he was redeeming under the senior  
lien, since it did not authorize him to make any entry in the sales  
book.

Appeal: FROM JUDGMENT NOT YET OPERATIVE. An appeal taken  
within five days of the date of judgment, should not be dismissed  
1 as premature, because the judgment provides that it shall not go  
into effect until after five days from its date. Such stay only  
affects the enforcement of the judgment.

*Appeal from Cass District Court.*—HON. W. R. GREEN,  
Judge.

TUESDAY, MAY 23, 1899.

DEFENDANT had given three mortgages upon his real estate. The first was held by one Leet, the second by Coe, and the last by plaintiff. Plaintiff also held a chattel mortgage executed by defendant to secure the indebtedness due it. The Leet mortgage had been foreclosed, and the property sold under it. Plaintiff had become the owner of the Coe mortgage by assignment. On the last day of the nine-months period following the sale under the Leet mortgage, near midnight, plaintiff applied to the clerk of the court to make redemption from such sale, informing that officer that it wished to redeem under and by virtue of the Coe mortgage. Redemption was duly made. We think the evidence justifies us in saying that after this, and within a very few days, plaintiff informed defendant that the redemption was made under the Coe mortgage, and that he (defendant) could redeem by paying the amount of the Leet judgment and the Coe claim. Plaintiff filed no statement, within ten days after the expiration of the nine-months period, of the amount it was willing to credit on its claim. Thereafter plaintiff brought this action in equity to foreclose the chattel mortgage, and sued out a writ of specific attachment, which was levied on a cow and some corn. A motion was made to release the attached property, on the ground that plaintiff's claim was discharged by failure to file the statement of the

amount it was willing to credit on its claim. Upon a hearing, the motion was sustained, and judgment rendered against plaintiff for costs. It appeals.—*Affirmed*.

*De Lano & Meredith* for appellant.

*J. M. Graham and John Hudspeth* for appellee.

WATERMAN, J.—The judgment provided that it should not go into effect until five days after its date. The notice of appeal was served before this five-day period expired.

Appellee moves to dismiss the appeal on the ground  
1 that the judgment was not in force when such appeal was taken. There is no merit in this claim. The court had concluded the controversy, and entered its findings against plaintiff. If the stay had any effect it only served to suspend enforcement of the judgment during the period mentioned, but upon its entry the judgment was effective in determining the rights of appellant. It could have appealed from it, though no attempt at its enforcement had ever been made. It was not as though the court had reserved some right, to be by it exercised later. An appeal would lie, if the entry here was merely an order for judgment, if it was final and determinative of plaintiff's rights. Code, section 4101.

II. We are required to determine but a single issue, and that is as to the effect of the redemption made by plaintiff. The trial court held that the result of the failure to file  
2 a statement of the amount it was willing to credit upon its claim was to wholly discharge such claim.

Under our statutes, the holder of a junior lien may redeem from an execution sale after six months, and before the expiration of nine months, from the day of sale, by the payment of the full sum, with interest and costs due upon the senior lien. But his lien, and the claim out of which it arose, will be held to be extinguished, unless within ten days after the expiration of the nine months he "enter on the



sale book the utmost amount he is willing to credit on his claim." Code 1873, sections 3109, 3114, 3115. In other words, the redemptioner will be held to take the property in satisfaction of his claim, if this statement is not filed. Appellant insists that, if the debtor has actual notice of the facts required to be entered on the sale book, the purpose of this statute is satisfied, and that the debtor in this case did have such notice. We might say there is no evidence here that the debtor was given notice of the amount plaintiff would take the property for. The most that can be claimed is that he was told of the two liens for which plaintiff claimed to hold the land. The statute requires the exact amount to be entered on the sale book, and it may well be questioned whether the notice to the debtor, if given personally, must not be equally specific. But we prefer to rest our conclusions upon another ground. The statute makes no provision for any other notice of the amount for which the creditor is willing to hold the land, than the entry in the sale book. There is no warrant for the substitution of any other, though it may seem better than that fixed. Further, where the creditor files no such statement, all right of redemption by other creditors ceases upon the expiration of nine months from the date of sale. If the entry is made as required, they may go on redeeming from each other, under the conditions provided in sections 3116, 3117, Code 1873, the debtor thus securing the advantage of having a larger part of his liabilities paid out of his property. Notice to the debtor is not all that is intended by the entry in the sale book. It is notice to other creditors, also. There is no claim in this case of actual notice of any kind to any other than the debtor. These views are sustained by *Tharp v. Forrest*, 76 Iowa, 195; *Lamb v. Feeley*, 71 Iowa, 742; *West v. Fitzgerald*, 72 Iowa, 306. We do not regard it as of any importance that

3 plaintiff told the clerk at the time of the transaction that it was redeeming under the Coe mortgage. This meant nothing to the officer. It did not authorize him to

make any entry in the sale book. The important question was not in what right plaintiff was redeeming, but what amount it was willing to take the property for. As to this fact, he gave no intimation to the clerk. Appellant relies upon the case of *Craig v. Alcorn*, 46 Iowa, 560, in support of its contention. In that case the creditor, at the time of making the redemption, filed with the clerk the statement required, but the clerk neglected to enter it upon the sale book until after the lapse of ten days. It was held that the creditor's claim was not extinguished by this failure of the officer. It appears, too, that the debtor, through his attorneys, had notice of the statement on file before the expiration of ten days. The record, it will be seen, was in fact made, so far as the redemptioner was concerned; that is, he had done all that the law required of him. All that was lacking was the entry in the sale book by the clerk for the purpose of giving notice. This notice the defendant obtained through other sources. What is said in the opinion as to the effect generally of actual notice must be taken with relation to the facts in issue. The judgment of the trial court is **AFFIRMED**.

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In the Matter of the Estate of MARY STUMPENHOUSEN,  
Deceased, HENRY STUMPENHOUSEN, Appellant.

**Wills: LIFE ESTATES: Construction.** A joint will, devising property to the survivor during life to use as he sees fit, without power to

- 1 sell but with a right to change the disposition of property as provided for by the will, gives to the survivor only a life estate
- 2 and the power to dispose of the remainder as a separate estate.

**CONSTRUCTION.** The word bequest may be held to refer to real estate

- 5 in one part of a will where the testator has plainly used it with that meaning in another part

**RULE APPLIED.** When a will giving personal property and a life estate in real property, with power "to change or modify the

- 5 specific bequests herein after made," uses interchangeably the words "bequest" and "devise," it will not be held that the power to change or modify refers only to personal property, on the ground that the word "bequest" is used.

108	555
123	64
108	555
130	460
108	555
141	98

**EFFECT OF.** A will devising a life estate, with power to the life tenant to alter the devise of the remainder, does not give the remainder men any vested interest, and if the power is exercised, the persons designated by the life tenant take under the original will.

**LANGUAGE TO CREATE.** No set form of words is requisite to the creation of a will, any language indicative of an intent to make a testamentary disposition of property being sufficient.

**Appeal: REVIEW.** The court will not construe the rights of devisees in a will which may be defeated by the exercise of power to alter them, given to a life tenant.

**REVIEW FOR APPELLEE.** A finding in favor of appellant, from which the appellees have not appealed, is conclusive.

*Appeal from Blackhawk District Court.*—HON. FRANKLIN C. PLATT, Judge.

TUESDAY, MAY 23, 1899.

**PROCEEDINGS** for the construction of the joint will of Mary Stumpenhousen and Henry Stumpenhousen. The trial court found that Henry Stumpenhousen took the personal property of the deceased absolutely, subject to the payment of debts; that he took a life estate only in the real estate belonging to the deceased; that Mamie Stumpenhousen, Anna Gutknecht, William Stumpenhousen, and Henry Stumpenhousen, Jr., took a fee-simple estate in the real property of the deceased, subject only to the life estate of Henry Stumpenhousen; that the limitations upon the fee-simple estate were void, and that the life estate of Henry Stumpenhousen was subject to the payment of debts. Henry Stumpenhousen appeals.—*Modified and affirmed.*

*Alfred Grundy* for appellant.

*Boies & Boies* and *J. C. Scott* for appellees.

**DEEMER, J.**—The will which we are asked to construe reads as follows:

“Know all men by these presents, that we, Mary Stumpenhousen and Henry Stumpenhousen, wife and husband, of Blackhawk county, Iowa, both being of lawful age and of

sound mind and memory, do make, publish, and declare this instrument to be, jointly as well as severally, our last will and testament, to-wit, hereby revoking all former wills:

"First. All just debts and funeral expenses shall at all times be fully paid.

"Secondly. We thereafter desire that all property, real as well as personal, of which we may be possessed at the time of the decease of either of us, shall be held by the survivor during his or her life, to use same as such survivor may see fit, except that such use shall not be construed at any time to mean that the survivor can sell any of the real estate, but is used here for the purpose of giving the survivor the right to change or modify the specific bequests hereinafter made.

"Thirdly. Upon the decease of the survivor it is our desire that our property shall be divided as follows: Our home in the city of Cedar Falls, Iowa, with all household goods therein, shall go to our daughter, Mamie Stumpenhousen, said home being lots 7 and 8 in block 12 of E. Brown's 2nd addition to said city. Then next to our daughter Anna Stumpenhousen, now Mrs. John Gutknecht, and to our son William Stumpenhousen, the north one-half of all the land we own in section No. 6, in township 88 north, range 14 west of the 5th P. M., which they shall divide so that our daughter Anna receives the west half thereof and our son William the east half thereof. Then next the south one-half of said land in said section shall go to our daughter Mamie Stumpenhousen and to our son Henry Stumpenhousen, which they shall divide in such a manner that Mamie receives the west half thereof and Henry the east half thereof. In such division they shall not take into consideration any of the road surrounding or adjacent to said lands, the intention hereof being to give to each of them one-fourth of the actual farm land outside of highways, and at the places of said section as above indicated; any right or easement in the public highway shall go to the heir to whose land such high-

way is adjacent. And in the event of the decease of any one of the above heirs and devisees without being married, or heirs in the lineal descent, then the share of such heir shall go to the survivors of the heirs above named. And we expressly provide hereby that none of said heirs shall have a power to sell or dispose of any of the above real estate during their respective lives, but shall bequeath and devise same to their respective lawful heirs; and such respective heirs shall not dispose of same for a term of twenty-one years from the date of decease of the party from whom it comes. The foregoing provision as to disposition shall also apply to the property in Cedar Falls, Iowa, herein given to our daughter Mamie. And we further provide that, after all debts are paid as above contemplated, then the residue and remainder of our personal property not herein otherwise disposed of shall, upon the decease of the survivor of us, be divided among said heirs share and share alike. In case of the need of administration hereon at the decease of one of us, that we agree upon the survivor as executor and without bonds. In witness whereof we have hereunto set our hands this 8th day of February, A. D. 1897.

"Mary Stumpenhousen.

"Henry Stumpenhousen."

The rule for the construction of such language as is found in the second paragraph of the will has recently been determined in *Law v. Douglass*, 107 Iowa, 606, and the distinction is there pointed out between an attempt to devise the estate remaining after the death of the devisee to whom an absolute fee is given and the remainder after the exercise of the power of disposition thereof as a separate interest where a life estate only is given; and it is there said: "To the gift of the life estate may be annexed the right to sell the remainder for defined purposes as a separate gift, and the devise of the part undisposed of is held good." In  
2 the case at bar the survivor is given a life estate, with power to change or modify the specific bequests thereinafter made by the testatrix. Power to sell or otherwise

dispose of the remainder is distinctly negatived. The added power is not of unqualified alienation. It merely gives to the survivor the right to dispose of the remainder as a separate estate, and does not enlarge the life estate theretofore devised to the survivor. *Mansfield v. Shelton*, 67 Conn. 390 (35 Atl. Rep. 272); *Collins v. Wickwire*, 162 Mass. 143 (38 N. E. Rep. 365). The trial court correctly held that appellant took but a life estate.

II. Appellant contends that the third clause of the will does not amount to a devise; that it is simply expressive of a desire or request, and is not sufficient to dispose of the property. Suffice it to say, in this connection, that no  
3 set form of words is requisite to the creation of a will.

Any language indicative of an intent to make a testamentary disposition of property is held sufficient. *In re Longer's Estate*, 108 Iowa, 34; Schouler Wills (2d ed.), section 262.

III. Again, it is contended that the devise to the children is of nothing more than a life estate, with remainder over to their children. Appellees argue, and the court found, that they take an estate in fee subject only to the life estate devised to the survivor. In view of our holding in the first division of this opinion, it will be observed that this is a  
4 moot question, which we ought not to determine in view of the power given the life tenant to make disposition of the fee. He has the right, under the will, "to change or modify the specific bequests thereafter made." Should he elect to do so, there might be nothing left to the children. It will be time enough to consider their rights when the occasion arises for us to do so. Appellees further say that the power to "change or modify" has reference to personal property only, for the reason that the clause giving this power uses the term "bequests," which refers to personal property only.

5 While it is no doubt true that the word relied on, when properly used, refers to personal property, yet in furtherance of the testator's intent, the words

"bequeath" and "devise" will be treated as synonyms if the context requires it. Schouler Wills (2d ed.), section 513; Code, section 3280. Moreover, in laying hold of the true meaning of a word used in a will it is usually held that when it occurs more than once, it will be presumed to have been used always in the same sense, unless the context shows a contrary intention. In the third clause of this instrument we find that the testatrix used the word "bequeath" with reference to real estate, and we are satisfied that she used it in the same sense when referring to the power of the survivor. Any other construction of the instrument would do violence to the language used, and thwart the plain intent of the testatrix. In no event would the rule in *Shelley's Case* apply, and if the survivor should elect not to use the power conferred upon him, the only question for solution would be whether the children take a life estate with power of disposition as a separate interest, or an estate in fee with absolute power of disposition. As we have already said, there is no occasion to determine this question in advance of an election made by the survivor. What we have so far said relates to

6 the real estate of the deceased. The trial court found that the survivor took the personal property absolutely, subject only to the payment of debts. As the appellees have not appealed, that finding is conclusive.

IV. The trial court found that, if the personal property was insufficient to pay the debts, the life estate of the survivor and the estate of the respective heirs should be sold in the order named for the balance remaining unpaid. Of this complaint is also made. Our holding renders it unnecessary to determine this question. If the personal property is insufficient to pay debts, the real estate, or a sufficient amount thereof to meet the indebtedness, must be sold; and such sale will not only deprive the survivor of his life estate therein, but also destroy his power to change or modify the subsequent bequests made in the will. Our conclusion is that

Henry Stumpenhousen, Sr., takes but a life estate in the real property of the testatrix, with power to dispose of the remainder within the limitations prescribed in the will, which he may exercise at his option; that if he exercises the power, then the persons designated by him take under the original will through the power vested in and exercised by him; that, if he elects not to exercise this power, then the "desire" of the testatrix will control; that the children do not take any present or vested estate; and that the real estate may be sold for the payment of debts, if necessary, after exhausting the personal estate of the testatrix. These conclusions do not exactly accord with those of the learned district court, and its decree will be MODIFIED and AFFIRMED.

108	561
131	280

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WILLIAM J. GALT, Appellant, v. ROBERT PROVAN *et al.*

**Wills: TESTAMENTARY CAPACITY.** One who at seventy-seven, loses her husband, and who then begins to manifest less and less independence of action, whose memory becomes continually poorer; loses sympathy for her family, forgets the burial of her children in Scotland, whom she formerly remembered with the greatest affection; who becomes penurious; who repeats old stories frequently in the same conversation; who evinces no sorrow nor appreciation at the death of her husband; who continually repeats questions in the same conversation; objects to her son's acting as administrator of her husband's estate; forgets the execution of papers within a few minutes; complains of inattention of her children, who frequently call upon her; who becomes very much

- 1 attached to a grandson who lives with her, and attends his wedding, but does not know he was married nor to whom, though he
- 3 married the girl who was then working for her, and whose mental decadence continues for seven years, at which time she makes a disposition of her property in favor of that grandson, although she has children living whom she ignores, has not the capacity to dispose of her property by deed or will.

**SAME.** The mind of a woman gradually weakened from 1895, when she was 77 years old, until 1896, when all her intellectual faculties were obliterated by *senile dementia*. In 1889 she wrote letters, indicating that her mind was sound, but in 1893 she had very

- 1 little power to remember recent events. In 1892 she executed a

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deed conveying her farm to her grandson, who for several years had been living with her, and working it for her. Prior to 1895 she could recognize acquaintances, and appeared to them to understand, so as not to show unsoundness of mind; but in 1895 a guardian was appointed for her. *Held*, that in 1892 she was not competent to dispose of land by deed.

**Duress: RECONVEYANCE.** An instrument which is executed by a man of twenty-seven, not acting under physical restraint, will not be set aside for duress, the weight of evidence as to threats being that none were made, and no corroborating circumstances being shown.

**RULE APPLIED.** In an action by a grandson, 27 years of age, and of average mental capacity, to set aside a quitclaim deed executed by him to his grandmother reconveying land which she had previously conveyed to him when she was of unsound mind, he testified that his father and four other relatives had induced him to execute the deed by threatening to prosecute him for obtaining the deed from his grandmother by undue influence. His father and the relatives denied the threats, and a notary public testified that the grandson had, after it had been read to him, executed and acknowledged an instrument confessing that he had used undue influence in obtaining the deed from his grandmother. *Held*, insufficient to show duress.

**SAME: Parties.** An action to set aside a deed reconveying land that had been previously conveyed to a grandson by his grandmother when she was of unsound mind, and to have the deed executed by her adjudged to be valid, cannot be successfully maintained by the grandson, though his deed reconveying the land to her was executed at the instance of interested third parties, who were intermeddlers.

*Appeal from Tama District Court.*—HON. G. W. BURNHAM,  
Judge.

TUESDAY, MAY 23, 1899.

ACTION to establish and quiet the title of certain lands in the plaintiff. There was a judgment for defendants, and the plaintiff appealed.—*Affirmed*.

*Endicott & Pratt* and *Struble & Stiger* for appellant.

*A. K. Hitchcock*, *C. B. Brandshaw*, and *Preston*,  
*Wheeler & Moffit* for appellees.

GRANGER, J.—I. In 1885 John Galt died seized of one hundred and sixty acres of land in controversy in this suit known as the "Home Farm." At his death he left surviving, his widow, Janet Galt, David Galt, who is the father of the plaintiff, Elizabeth Provan, and Jean McCormack. The children, David, Elizabeth, and Jean, are defendants in this case. Defendants Robert Provan and Peter McCormack are, respectively, the husbands of Elizabeth and Jean, and defendant Mary Galt is the present wife of David Galt, the plaintiff being his son by a former marriage. The widow, Janet Galt, is now under the legal guardianship of Robert Provan, who is also defendant in that capacity. Plaintiff's mother died in 1868, soon after which, in pursuance of her request, he went to live with his grandparents, John and Janet Galt, and continued to live with them until the death of his grandfather, in 1885, and afterwards with his grandmother till about February 19, 1895. John Galt died testate, leaving to his widow the home farm, being all his real estate, and all his personal property. Janet Galt, at 1 the death of her husband was about seventy-seven years of age. Soon after the death of John Galt, plaintiff, with his grandmother, moved to Traer, for better educational advantages, and he attended school there and at Des Moines till 1889, when they returned to the farm. Plaintiff took charge of the farm, and was allowed therefor, by his grandmother, two hundred and fifty dollars per year for his services. In January, 1892, his grandmother made to him a deed of the farm, which was not filed for record, and in October, 1894, she made a will, in which she gave to each of her three children one thousand dollars, and the remainder of her property to plaintiff. Plaintiff had at all times been industrious, faithful, and kind to his grandparents, and was held in high esteem by his grandmother. Up to 1889 plaintiff had been supported and given good educational advantages, and in return he had given a service and deport-

ment that was entirely satisfactory; and it is to be said that after 1889, when they returned to the farm, and he began to receive wages, the same kindly feeling existed between him and his grandmother. It may be well in this connection to state that up to February, 1895, there was never an unfriendly feeling, misunderstanding, or complaint by any member of the family, including the brother and sisters, as to the plaintiff, and there was at all times friendly intercourse. Up to February 20, 1895, plaintiff remained single. A day or two before that it became known that he was to be married on the twentieth, and Elizabeth and Jean, with their husbands, went to the house of David Galt on the morning of the 19th, and informed him of the contemplated marriage of the plaintiff, and it was then thought advisable that there be a settlement as to the matters between plaintiff and his grandmother; and plaintiff's father (David) went to the house of plaintiff and his grandmother, and asked him to take his books and go home with him, to look over the accounts, which the plaintiff did. On reaching David Galt's house, there were present the sisters and their husbands and David's wife. Upon inquiry the plaintiff made known the facts as to the execution of the deed and will, and plaintiff and his father returned to the grandmother's house, and plaintiff obtained them, and they returned with them. While at David Galt's that day, plaintiff executed a quitclaim deed to his grandmother of the home farm, and also a deed for about nineteen acres of land adjoining, that he had purchased with his own earnings; and had also signed and acknowledged the following:

"I, Wm. J. Galt, hereby make the following voluntary admissions: 1st. That I used undue influence on one Janet Galt, widow of John Galt, deceased, and by such influence induced the said Janet Galt to make a certain will on  
2 the 9th day of October, A. D. 1894, by which I was a beneficiary and legatee. 2nd. That on the 14th day of January, 1892, through my influence, unduly exercised, the said Janet Galt gave me a certain warranty deed, which

I have hereby given to Robert Provan, with my free consent to destroy. [Signed] William J. Galt.

"State of Iowa, County of Tama—ss.: On the 19th day of February, A. D. 1895, personally appeared the above-named William J. Galt, and acknowledged his signature to the above instrument to be his voluntary act and deed. [Signed] A. K. Hitchcock, Notary Public in and for Tama County, Ia."

The deed of Janet Galt to the plaintiff was delivered to Robert Provan, and destroyed. The will was taken by David Galt, and the next day, in pursuance of an understanding with his sisters and their husbands, he took it to his mother, who, in the presence of plaintiff and himself, destroyed it. As a part of the transaction on the nineteenth of February, at the house of David Galt, the following—omitting formal parts—was signed by plaintiff and David Galt and his two sisters: "That for and in consideration of the agreement by the said David Galt, Jean McCornack, and Elizabeth Provan, said parties of the second part, that said Wm. J. Galt, said party of the first part, shall receive one-fourth interest in the estate of John Galt, deceased, and Janet Galt, widow of said John Galt, and the further consideration that the said David Galt, Jean Galt and Elizabeth Provan, parties of the second part, shall relinquish to the said Wm. J. Galt, and by these presents do relinquish, all their right, title, and interest, either present or future, in the personal property upon the following described real estate, to-wit, 'the east one-half ( $\frac{1}{2}$ ) of the southeast quarter of section thirty-two (32), township eighty-six (86) north, of range fourteen (14) west of the 5th P. M., with the exception of the household furniture upon said real property, I, Wm. J. Galt, party of the first part, hereby agree to relinquish all claims upon the estate of John Galt, deceased, and upon the estate of Janet Galt, widow of said John Galt, deceased; and further the said Wm. J. Galt relinquishes all interest he may have in one certain last will

and testament of the said Janet Galt, made and executed on the 9th day of October, A. D. 1894. The said Wm. J. Galt further agrees to deed to the said Janet Galt the certain real estate amounting to eighteen acres, more or less: provided, that, should said Wm. J. Galt at any time in the future make any further claim on the estate of John Galt, deceased, or Janet Galt, the widow of said John Galt, then this instrument to be null and void, and these presents of no effect." At this time it was also understood that a guardian should be appointed for Janet Galt, and Robert Provan was so appointed, and there was, further, an understanding that plaintiff should lease from the guardian the farm for a cash rent; and in pursuance thereof, in March following, a written lease was executed, signed by plaintiff and the guardian, and the place was so occupied, and one or two payments of rent made thereon. This action was commenced in February, 1896, to set aside the deeds made by plaintiff to his grandmother, and to establish his title to the land deeded by her, and also what he formerly purchased; and the petition charges that the deeds made by plaintiff, and all that was done by him on the nineteenth day of February, 1895, and in the further carrying out of the agreements that day made, was under duress; that he was told that the obtaining of the deed and will by undue influence was a crime, punishable by imprisonment in the penitentiary; and that one of them said he would prosecute him if it took a farm and another farm on top of it, and also that what he had done would blacken his good name. The answer denies all these averments as to duress or making of threats, and shows that the surrender of the deed and will was voluntary, that plaintiff executed the papers that day signed by him voluntarily, and that the deeds and agreements were made in pursuance of a full and complete settlement. It is further made to appear by the answer that when the deed and will were executed by Janet Galt she was of unsound mind, and incapable of doing such acts,

and that they were both the result of undue influence by the plaintiff. The averments as to undue influence and unsoundness of mind are denied.

In considering the question of unsoundness of mind of Mrs. Galt, we can only notice a fraction of the testimony bearing on the question by either side. It may be well to preface what we are to say by this somewhat general statement, that the evidence throughout shows  
3 that about 1885, when about seventy-seven years of age, and near the time of her husband's death, there was a visible change in her mental condition, manifested particularly by a deficiency of memory. The witnesses on the different sides made the situation appear differently, but unmistakably there was a change, which grew more manifest as the years went by. Mrs. Galt seemed to be a woman of rather marked physical vigor, with good hearing and eyesight. Some of the particular facts relied on to show unsoundness of mind are as follows: "Prior to 1885 she was of independent, strong mind and fair memory, sympathetic and demonstrative when her sympathies were excited, especially about her children and relatives; had confidence in her children; was saving but not penurious; was neat in her habits and person; could carry on a conversation intelligently and connectedly; was not in the habit of repeating old stories to the same person in the same conversation more than once; did not worry about becoming poor; and had full knowledge of the death and burial of her children who died in Scotland previous to her emigration to this country, which occurred in 1856. After about 1885, which was the year that her husband died, she did not seem to appreciate the fact of his loss, and when it was mentioned to her merely looked, and said nothing, and did not evince sorrow because of his death; seemed forgetful of recent or current events of which she had full knowledge; appeared careless about her dress; was penurious, and would sometimes say, when she was told that she needed

anything, that she could not afford it,—the income being at this time the value of the products of her farm and about eight per cent. on about four thousand five hundred dollars, which she had out at interest. She displayed a tendency to talk about the old country, and things that happened in her young days, and seemed to remember them better than recent or current events; would ask the same questions over and over again in the same conversation with the same person; did not want her son, who was appointed administrator of his father's estate, to keep the papers which belonged thereto; could not be made to understand why she had to sign certain receipts connected with the settlement of the estate, and after signing same, would forget the transaction within a short time; would say of her children who had called on her recently and frequently that she saw them but seldom. When it was suggested to her, in 1891, that a tombstone be erected for her three children that were buried in Scotland, she said that she had no children there, when in fact she had three. In the spring of 1892 she was told that her grandson Willie was going out to some entertainment in the evening, and probably would not be back until ten or eleven o'clock. She asked within about five minutes where he was and when he would be back, and would keep asking that every few minutes during the evening, after having been fully answered several times. She was present at the marriage of her grandson Willie on the 20th day of February, 1895, and two or three days after asked if Willie was married, and she said she didn't know. She was living in the same house with Willie at the time he was married. She then asked who Willie was married to. Willie had married the girl who was then working for her, and had been for some time. On the day of Willie's marriage she said she wished she had some sewing to do. The person addressed said surely she wasn't going to sew today, and she replied, 'Is this the Sabbath?' and was answered, 'No, it is not the Sabbath, but Willie is going to get married today.' She didn't know anything about

it, although she had been told the marriage was to take place at that time a short time before." These are but a part of very many facts relied on. These facts are not disproven by other evidence, but it is in evidence that in some particulars, up to 1895, at least, she appeared to understand, and really gave no evidence of unsoundness of mind. Some, who were neighbors, who knew her intimately, met her often, were recognized by her and saw no unsoundness of mind. As to the number of witnesses, those for defendants preponderate but slightly in number. Those for defendants had, as a rule, better opportunities to judge of the facts from a more intimate acquaintance with her, and their testimony is less general in its tenor by showing the particular facts on which are based their conclusions. Dr. Fairchild was a witness for the defense. It appears that he is a man of extended information on the subject of brain disease. He visited Mrs. Galt in November, 1896, at the instance of counsel for defendants, and examined into her condition, preparatory to testifying in the case. To him was submitted a hypothetical question embracing the facts above set out, with many others more remote from the period under consideration. To the question, "What is your opinion of the soundness of mind of the defendant Janet Galt from 1891 to 1895, inclusive, based on such facts?" he answered: "I would say, if the hypothetical question as read is true, that she wasn't of sound mind from the period of 1892 to 1895, inclusive. Would say she was suffering from senile dementia. The first evidence, as gained from the question, it would probably be in 1885. This disease involves a structural change of the brain. When I saw Mrs. Galt, the disease had progressed to such an extent as to obliterate all her purely intellectual faculties. After this structural change had taken place, it would not be possible for the sufferer to have a lucid interval. When I saw Mrs. Galt all her intellectual faculties were obliterated. In the very earliest stages of the disease it would be possible for a person to do certain things



in a reasonable and natural manner. In a later stage it would be less possible for them to do so, and the time would come when they could not do those things at all. A person who had been accustomed to do certain work would continue to do it in a mechanical manner. She would be able to meet and greet people in an uncertain manner." "The history of the case in the hypothetical question would be important in determining the progress of the disease in the old lady's case. The condition of her brain was not the same prior to 1888 and 1889 as it is today. I know it wasn't from the facts stated in the hypothetical question. I would say the unsoundness of mind of the old lady began as early as 1885, perhaps sooner. Where the structural change takes place, the extent of the unsoundness of the mind is determined by the ability of the patient to think, and by the history of the case, and the exercise of mental processes. If a person thus afflicted is able to think connectedly, coherently, and transact business correctly, that would indicate the trouble and unsoundness of mind was very slight. When the structural change has progressed any considerable degree, it is impossible for a person thus suffering to think connectedly, or to perform correct mental processes. And if a person claimed to be thus afflicted could perform extended mental processes correctly, and in harmony with existing facts, it would indicate, to my mind that there had been but little change or disturbance of the mental faculties. In order to determine with any degree of certainty if a person at a given time is capable of executing a will or making a gift, I should want to know the ability of that person to perform mental processes,—to reason correctly and deal intelligently with facts and affairs of life that surround them. One of the tests of mentality and of correct mental operation is from what a person is able to put on paper. If the old lady, from 1885 to 1889, kept house,—attended to her household affairs, made the necessary purchases therefor, and paid her rent regularly,—that would be a strong indication that her mental processes were right and

correct, so far as that goes." "If senile dementia was long extended, the patient would not be apt to remember the name and faces of her children. If, at a given time, she knew her children in connection with other things, that would be an indication her mind was sound. If, at any given time, the old lady knew all her children, and knew what property she had, and was able to talk of her children and property, and about the disposition she desired to make of it to her children and grandson, that would be a very strong indication that the structural changes in the brain hadn't progressed so far as to materially injure the mind. If the structural changes have progressed far enough to injure the mind in its mental processes, the patient is unable to think and talk connectedly and coherently. If a person is able to express himself logically in regard to the ordinary affairs of life and business matters, that is an evidence that the mind is very slightly, if at all, impaired." The answer given embraces the original cross-examination, and it has the appearance of being impartial, and the conclusions seem reasonable. We are, of course, to determine the truthfulness of the data on which they are based from the evidence. In this respect, when all is considered, there is little room for doubt. Early in 1895 Mrs. Galt was placed under guardianship, involving the usual judicial inquiry, and, whatever that may have been, it has been continued, so far as appears, without question. That condition came, not suddenly, but gradually. It commenced as early as 1885, or before; and nothing discloses that at any time there was a perceptible sudden change. The plaintiff was a subscriber to the affidavit of unsoundness of mind which was the basis for the guardianship proceeding. It is true that he says that this, as well as other things done by him, was under duress. Dr. Fairchild is fully corroborated by other expert testimony from physicians. We do not understand the correctness of the expert testimony as to conclusions to be questioned, if the facts on which they are based are found to be true. Much reliance, in this

respect, is placed on letters written by Mrs. Galt in 1888 and early in 1889, while yet at Traer. We think these letters the strongest features of plaintiff's evidence against unsoundness of mind, and we have examined them closely. They were written three years before the deed was made, and nearly six years before the execution of the will. Considering the gradual change in her mind, the letters lose much of their force as evidence in consequence of the time between the writings and the execution of the papers. Our conclusion is that when the deed was made, in 1892, and thereafter, Mrs. Galt was not of sound mind, so as to be competent to dispose of property by deed or by will.

II. We are next to consider the question if plaintiff, on the 19th day of February, 1895, in making the deeds he now asks to have set aside, acted under duress. It may be well to state here that David Galt, the father of plaintiff, had been the executor of the will of his father, at his mother's

request, she having been named as executrix in the  
4 will. Because of this, as well as for other reasons, he had much to do with the business affairs of his mother outside of the home and farm management, and everything had been conducted in a spirit of friendliness. When the parties came together at the house of David Galt on the 19th of February, there had never been any trouble whatever, and before the disclosure as to the deed and will there is no reason to think that more was contemplated than a mere inquiry into and settlement of the business affairs of plaintiff with his grandmother. Hence, in looking at the question of duress, it may be said that there was nothing to influence or affect plaintiff outside of what occurred that day. Of the seven persons present all are witnesses, and all may be said to be interested more or less, but none more so than plaintiff. This is important, because, as witnesses of what occurred, there is a direct conflict, the plaintiff alone testifying that threats were made as charged, and the other six testifying directly to the opposite. It is true that one

of the witnesses for defendants was not at all times present, but she was much of the time. On this as on the other branch of the case, we can only generalize. It is not practicable to detail the evidence. As the plaintiff is so far outweighed in numbers, if he establishes his claim of duress, there must be corroborating facts to aid his statements. The transaction, as a whole, is not complimentary to the parties engaged in it. It was unusual in its inception and its accomplishments. As to the inception, the parties, other than the plaintiff, were without the sanction of authority. As to what was accomplished, in view of what has since occurred and present conditions, the question of its binding effect is doubtful and difficult. We do not believe the fact of duress is established. Plaintiff was, at the time of the transaction, twenty-seven years old, of fair education, and a man of usual experience as a farmer. As appears by the record,—and his examination as a witness is quite extended,—he is intelligent, with nothing to place him below the usual man of his age in any particular. He says he did not influence his grandmother to make the deed or will. If that was true, he knew it on the nineteenth day of February, 1895, as well as now. There was at that time no pretense by any one that facts were known to show undue influence by him, and he knew it was not a fact, and could not be made to appear. It is in evidence that at one time in 1889 the grandmother said to plaintiff's father that Willie (plaintiff) was bothering her all the time about the farm,—wanted the farm,—and wanted him to talk with Willie, and that he did so. Plaintiff denies such a talk, and it may be said that if, on the nineteenth day of February, such things were said as that it was a criminal offense, and he would be prosecuted, and his good name blackened, he had no reason, as a reasonable man, to be intimidated. The ordinary man of his age and standing would have resented it with contempt, in the light of his own knowledge, and in the absence of anything to make it appear probable that there could be a conviction, or

his name blackened. We do not apply to him the rule that he must have acted as a reasonable man, but from the showing there is no reason for saying that he would not have been influenced as a reasonable man would have been. There is a strange inconsistency in his statements and conduct in this: that while he was doing anything that might be asked of him to avoid a conviction, and the blackening of his good name, he solemnly, in the presence of an officer, who was not a party to the transaction, and in no way bound to keep the document a secret, put his name to admissions of the facts that he understood would constitute the crime, and blacken his name. It is true that he says he did not read it, and that he executed it under duress. In this he is contradicted by the officer, who was a witness, by the instrument itself, and by other witnesses. If his statements are true, he made, under circumstances that ought to intimidate no man, a complete surrender of his manhood and his independence by putting himself absolutely under the dictation and control of others, whom he knew to be acting against his interest. It appears from the testimony of the officer that before the paper was drawn he asked plaintiff if he was willing to sign such a paper, and he said he was; that it was then drawn, and read to him, and he said it was all right, and he signed and acknowledged it. He knew the contents of other papers, and there appears no reason whatever why he should not have known the contents of this; and to believe that he did not is to accept his statement against that of all the other witnesses, and against facts that show his statements unreasonable. On the same day it was talked that plaintiff was to lease the farm, the contract to be executed later, when a guardian should be appointed for Mrs. Galt; and the first steps were taken that day to secure such appointment by the plaintiff making an affidavit of her unsoundness of mind. In March thereafter the lease was executed, and was partly performed. All this time, it is plaintiff's theory, he was under the same duress, and all this time, as he states, think-

ing his grandmother was not of unsound mind, so that the facts as to undue influence could have been definitely known. Whatever may have been the facts as to some particulars in the case, it is not to be found from the record that the plaintiff acted under duress in making the deeds and other papers.

A point is made in argument that David Galt and the others with him on February 19th were intermeddlers; and that is true, and, were the facts otherwise, we might conclude this case on that theory. But the case comes  
5 to us at the instance of plaintiff, seeking affirmative relief, not as to the intermeddlers, but he has brought in Janet Galt, and asks an adjudication against her that the deed made to him is valid; and, with our finding of her incompetency to make such a deed, the case must be determined as between plaintiff and Janet Galt. That is, practically, the only question in the case. What we have said disposes of all the issues made by the pleadings, and the decree is **AFFIRMED**.

108	575
135	227
1135	229
108	575
135	276

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PETER C. MILLER v. F. BECK & COMPANY and J. D. EDMUNDSON, Appellant.

✓ **Joint Tort Feasors: RELEASE OF ONE.** Where creditors of a debtor employed the same attorney, and separate attachments on their  
2 debtor's property are levied on the creditors claims, neither creditor being in any way interested in the other's claim or its prosecution, they are not joint tort feasors, where the attachments were improperly levied, so that a release as to one of them would discharge the other, as against a claim for damages by the attachment debtor.

**SATISFACTION BY ONE: Attachment.** The payment by one of two  
1 wrongful attaching creditors of a judgment for the damages sustained by the debtor from the levy on certain goods of the two writs, but made at the same time and by the same officers, is a bar to an action against the other creditor for the trespass, as it was a single act with one purpose.

**SAME.** Complete satisfaction for an injury operates to discharge all  
1 who are liable therefor, whether they be joint and several wrong

5 doers, or several wrong doers, or though the party satisfying is  
6 in nowise liable for the injury.

SAME. Attachment writs were unlawfully levied by distinct creditors upon the same property at the same time. Thereafter the attachment debtor recovered against one of the creditors damages for  
1 such unlawful attachment, and the judgment was satisfied. *Held*,  
that such satisfaction was a bar to a subsequent action against  
3 another of such attachment creditors to recover damages, except as to any costs made on his writ independent of those made under the writ for the levy for which damages were recovered, and for attorney's fees.

ROBINSON C. J. and WATERMAN, J. dissenting.

**Measure of Damages: PARTY TO SUIT.** Damages for wrongful attachment should not be made to depend upon a verdict in a suit to which respondent in damages was not a party.

WATERMAN, J. concurring.

*Appeal from Pottawattamie District Court.*—HON. WALTER I. SMITH, Judge.

WEDNESDAY, MAY 24, 1899.

ACTION at law upon an attachment bond to recover damages for the alleged wrongful suing out of an attachment. Defense, a general denial, and an affirmative plea to the effect that the damages claimed by plaintiff have been paid by the recovery of judgment for the identical items claimed in this case in an action wherein plaintiff recovered upon an attachment bond against other attaching creditors. The case was tried to a jury, resulting in a verdict and judgment for plaintiff, and defendant appeals.—*Reversed*.

*Sims & Bainbridge* for appellants.

*Harl & McCabe* for appellee.

DEEMER, J.—It appears from the evidence that F. Beck & Co., and a co-partnership styled Shaber, Reinthal & Co., were creditors of Peter C. Miller. Apprehensive of their claims, they placed them in the hands of appellants' counsel, who brought actions upon the separate accounts, each of

which was aided by attachment, and directed the sheriff to levy upon certain property belonging to Miller. The writs were issued at the same time, but the sheriff, by direction of counsel, made levy of the Beck & Co. writ first. The other writ, in so far as the personal property is concerned, was levied subject to the one issued in the Beck & Co. case. The personal property was sold as perishable for the sum of five hundred and twenty dollars, all of which, save the sum of thirty-one dollars, applied on rent, was paid into court. Beck & Co. obtained judgment in their action against Miller, and received in part satisfaction thereof the sum deposited in the court, as well as some other money obtained through garnishment proceedings, in all the sum of five hundred and sixty dollars and fifty-three cents. Shaber, Reinthal & Co.'s claim was upon notes amounting to five hundred dollars, which were admitted by Miller. Miller made defense to their action, and pleaded a counterclaim for the wrongful suing out of the writ. The items of damages which he claimed in that case were identical with those sought to be recovered in this. That case went to trial, resulting in a verdict and judgment for defendant, Miller; and  
1 it thus appears that he was allowed five hundred dollars for the wrongful suing out of the writ. This amount he has received in full; for the claim against him, to the amount of five hundred dollars, has been satisfied and discharged. The costs and attorney fees taxed for the wrongful suing out of the writ have also been paid.

Appellants' contention on this appeal is (1) that plaintiff has once been paid all damages growing out of the alleged wrongful suing out of the attachment, and therefore cannot recover them a second time; (2) that the plaintiffs in the two attachment suits were joint wrongdoers, and that the judgment in the Shaber, Reinthal & Co. case was a release and satisfaction of all claims against either.

It is familiar doctrine that a person injured by an act of joint wrongdoers is entitled to but one satisfaction for the

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injury sustained, and that, although all the wrongdoers are jointly and severally liable, complete satisfaction by one operates as a discharge of all. *Turner v. Hitchcock*, 20 Iowa, 310; *Seither v. Traction Co.*, 125 Pa. St. 397 (17 Atl. Rep. 338, 11 Am. St. Rep. 905, and note). This is upon the theory that each is liable for the entire wrong, and that recovery from one is for the full amount, and hence satisfaction as to one is satisfaction or release as to all. Even where this rule prevails, it is generally held that part payment of a claim for damages by one joint wrongdoer, if understood to be in part satisfaction, is not a release in full, but only *pro tanto*; and that if the apparent intention is not to release or discharge the debt, but to release only that one from liability, it is held to be a covenant not to sue, and the others remain liable. *Ellis v. Esson*, 50 Wis. 138 (6 N. W. Rep. 518); *Chamberlain v. Murphy*, 41 Vt. 110; *Shaw v. Pratt*, 22 Pick. 307; Cooley Torts, p. 139; *Couch v. Mills*, 21 Wend. 424. It is also well settled that a person injured, whether by the joint or several wrongs of others, is not entitled to receive more than one satisfaction. As said by Miller, J., in *Lovejoy v. Murray*, 3 Wall. 1: "When plaintiff has accepted satisfaction in full for the injury done him, from whatever source it may come, he is so far affected, in equity and good conscience, that the law will not permit him to recover again for the same damages." In accordance with this rule, it has frequently been held that the validity and effect of a release of a cause of action does not depend upon the validity of the cause of action, and that if the claim is made against one, and it is satisfied, all who may be liable are discharged, whether the one released be liable or not. *Leddy v. Barney*, 139 Mass. 397 (2 N. E. Rep. 107); *Tompkins v. Railway Co.*, 66 Cal. 163 (4 Pac. Rep. 1166); *Brown v. City of Cambridge*, 3 Allen 474; *Butler v. Ashworth*, 110 Cal. 614 (43 Pac. Rep. 386); *Metz v. Soule*, 40 Iowa, 236.

It becomes material for us to inquire then, *first*, whether plaintiffs in the attachment suits were joint tort feassors; and, if they were not, then, *second*, whether appellee has received satisfaction for his injuries in the Shaber, Reinthal & Co. case. Now, while it is true that the writs were sued out at the same time, and plaintiffs in attachment were represented by the same counsel, yet neither creditor was interested in the success of the other, and neither attempted to aid the other in any manner. Each acted independent of the other, and for the purpose of securing his own claim. What each did was designed for his own interest, and the fact that they acted simultaneously, through the same attorneys and for the same reasons, did not make their acts joint. *Brewster v. Gauss*, 37 Mo. 518. This is not a case in which a single object is accomplished by the simultaneous service of different writs, as was *Stone v. Dickinson*, 5 Allen 29. We are of opinion that the creditors in this case were not joint wrongdoers, and that a release or satisfaction as to one would not necessarily discharge the other. If there was such release or discharge, it was because plaintiff has received satisfaction for the wrong done him by accepting a verdict and judgment in the Shaber, Reinthal & Co. case; and to this we now turn our attention.

In his counterclaim for damages, as well as in this action, he sued for conversion of his personal property, and for the damages incident thereto; claiming in each pleading that his property had been taken, used, and converted by that particular attaching creditor. If this action was trover or conversion, then it is clear that he cannot have payment for his property twice. The rule is well settled that, upon payment of a judgment for conversion, if not before, the title to the property passes to the judgment defendant and plaintiff cannot again sue for conversion of the identical property, for the plain reason that he cannot give title and has no longer any interest in the property; for his right thereto has passed to the first judgment defendant.

But it is said that appellee was asking for damages done his property in each suit, and that he is entitled to damages for what each defendant did. If he had asked in each suit for the damages done by the defendant against whom his action was brought, there would be no doubt of his position. But such is not the fact. The writs were levied upon the same property, to-wit, a stock of wall paper, moldings, etc., and the garnishments ran against the same debtor of Miller. They were levied at the same time, and the trespass resulted from but a single act of the sheriff, done under the two writs, it is true, but done at one time, and for the single purpose of turning the property into money, that it might be applied on whatever judgments were obtained. Now, in the Shaber, Reinthal & Co. case, appellee asked for all the damage done his property. The court instructed that he was entitled to all that was done, and, having accepted the results of that suit, he is presumed to have received all that he is entitled to claim, except it be some items which were peculiar to the second suit. The trial court, in the case at bar, instructed that appellee was entitled to the same and identical damages which he claimed in the Shaber, Reinthal & Co. case; but further said they should credit appellant with the amount allowed Miller in the former suit. It is of these instructions that appellant complains. It is perfectly plain, we think, that, if appellee was allowed and paid all the damages done his property upon his counterclaim in the Shaber, Reinthal & Co. case, he cannot recover the same items again, in a subsequent suit against appellants. He undoubtedly made claim in that case to all damages done his property. Shaber, Reinthal & Co. seemed content to pay all if they paid any, for they did not attempt to shift any part of the

3      responsibility upon another. The court before which the action was pending said to the jury, in its charge, that they should allow all damages done the property, whether direct or consequential, and that ought to satisfy appellee, except as we have said as to certain items which

were peculiar to this case. These are the costs of levying the writ, which were not paid in the former proceeding; and, *second*, attorney's fees for defending against this particular attachment. Attorney's fees are to be taxed by the court, however, and consequently were not referred to in the instructions in either case. It may be that the costs of levying the attachment were not allowed in the former action, but this we have no occasion to determine, for the reason that the instructions objected to include all other items of damages done to the property by the levy of the writ.

If it be conceded, however, that each attaching creditor was liable simply for the damage done by him, and that appellee in his counterclaim against Shaber, Reinthal & Co. did not seek to, and did not in fact, recover more than the damage done by that particular creditor, yet it is manifest the instructions given in the case were wrong, for the reason that the whole matter is made to depend upon the verdict of a jury in an action to which appellant was not a party. The court instructed in each case that appellee was entitled to all the damages done his property, and the elements of damage which the jury were told to consider were precisely the same in each case. In the case at bar, however, the jury was told to credit the amount allowed by the jury in the former case upon the allowance made in this. Surely, this is a very uncertain way by which to determine the amount of damages done by this appellant. Suppose the jury, in the Shaber, Reinthal & Co. case, had fixed the damages at half the amount actually done, appellant would then be compelled to respond for much more than the damages done by it; or, if the jury in the first case had allowed too much, then appellant would not be called  
4        upon to pay what it ought. In other words, the whole matter of damages is made to depend upon the verdict of a jury in a case to which appellant was not a party, and which was in no manner binding on it. This thought illustrates the vice of the instructions relating

to damages and to the plea of payment, interposed by appellant. Had the two attaching creditors been guilty of separate acts of trespass, or had they levied upon different items of property, or had one done a wrong to the property in such a manner as that the particular damage inflicted thereby could be ascertained, then it is likely that satisfaction as to one would not release the other. But where, as in  
5 this case, the injury is an entirety, and the damages cannot be apportioned, and the injured party sues for the wrong done, and recovers judgment, which he accepts as compensation for the wrong, such recovery will be a bar to any further claim for damage, for the plain reason that the law will not allow more than one satisfaction for a wrong done or injury inflicted. See cases heretofore cited, and especially *Metz v. Soule*, 40 Iowa, 236.

As we have seen, it is entirely immaterial that the one from whom satisfaction was demanded and received was not liable for the entire damage. Indeed, if he were  
a stranger, and not responsible for any part  
6 of it, the rule would be the same. It is important that we distinguish in this connection between what the law denominates a "release" and what is called a "satisfaction." A release may be given, although no part of the damage has been paid, and a technical release to one who is not a joint wrongdoer will not necessarily release another, who may have had some connection with the wrong. See, as illustrating this rule, *Ellis v. Esson*, 50 Wis. 138 (6 N. W. Rep. 518); *City of Chicago v. Babcock*, 143 Ill. 358 (32 N. E. Rep. 271); *Long v. Long*, 57 Iowa, 497; *Knapp v. Roche*, 94 N. Y. 329; *Turner v. Hitchcock*, 20 Iowa, 310. A satisfaction, however, by whomsoever made, if accepted as such, is a bar to further proceedings on the same cause of action. Payment is a satisfaction, and, under the facts disclosed by this record, the case should have been submitted on the theory that all damages to the property, direct and consequential, were paid by

the former judgment, and that appellant's liability was for costs made upon its writ, independent of those made on the Shaber, Reinthal & Co. attachment, and for attorney's fees. The judgment of the district court is REVERSED.

WATERMAN, J. (specially concurring).—I concur in the reversal of this case because of the error in the instruction relating to the measure of damages. Upon the other propositions discussed, I am with the dissent.

ROBINSON, C. J. (dissenting).—I. The theory of the appellants on the original submission was that Beck & Co. and Shaber, Reinthal & Co. were joint wrongdoers, and that the satisfaction of the claim of the plaintiff, as against the latter, operated to release the former. It was not understood by the court, nor apparently by counsel for the appellee, that the appellants claimed that satisfaction of the demand of the plaintiff against Shaber, Reinthal & Co. would operate as a release of Beck & Co., even though they were not joint wrongdoers, and the original opinion was written to meet the theories on which the case was submitted. If it can be said that the appellants did make the claim indicated, it was done so obscurely that it was properly disregarded. It is fairly presented for the first time in the petition for rehearing. But it has been the well-settled rule of this court not to grant relief on grounds asked for the first time in a petition for rehearing. *McDermott v. Railway Co.*, 85 Iowa, 192. Therefore I am of the opinion that the appellants are not entitled to the relief given by the decision of the majority.

II. I agree with the majority that Beck & Co. were not joint wrongdoers. Having reached that conclusion, it seems to me that it should follow, as a logical result, that payment by one of them would, at most, operate to discharge the other only to the extent of the payment. But the majority, after holding that there was not a joint wrong, illogically, as I think, hold that, as the writs of attachment were levied

upon the same property, at about the same time, the trespass resulted from but a single act of the sheriff, and for the single purpose of turning the property into money, that it might be applied on whatever judgments were obtained. The fact is that the writs were not levied simultaneously. That of Beck & Co. was the one first levied upon the stock, and full possession was taken under it, not for the purpose of turning the property into money, that it might be applied on "whatever judgments" should be obtained, but to hold the property for the purpose of applying it in payment of any judgment which Beck & Co. should recover. The levy under the Shaber, Reinthal & Co. writ was made after the other levy was completed, and was only designed to hold so much of the property previously levied upon as should not be required to satisfy the claim of Beck & Co. The possession taken under the first writ was not in any manner affected by the second levy. This must have been the case, if there was not joint action and a joint trespass.

I think the majority err in saying that the court instructed the jury in the Shaber, Reinthal & Co. case that Miller was entitled to all the damages done his property. The material inquiry as to damages in that case was, what damages were caused by the wrongful suing out of the writ in that case and the proceedings thereunder? and the damage which resulted from the writ issued in favor of Beck & Co. was not referred to in the pleadings, nor in the charge to the jury, nor was it properly involved in the case. Therefore, if Miller recovered in that case for damages caused by Beck & Co., he recovered that to which he was not entitled; but that fact, according to ordinary rules, concerned only the parties to that action.

The question to be determined in this action, after it has been ascertained that the writ was wrongfully sued out, is, what damage was caused by the wrongful suing out of the writ in this case? not the aggregate damages caused by the wrongful suing out of the two writs. If it be conceded, however, for the purpose of this case, that credit for any

payment made in the case of Shaber, Reinthal & Co., on account of damages which were in fact caused by the issuing of the writ in the Beck & Co. case, should be given in this case, it does not follow that such payment operated to discharge Beck & Co. from further liability. As we have seen, no claim was made in the Shaber, Reinthal & Co. case for damages caused by the Beck & Co. writ. Since the firms were not joint wrongdoers, it cannot properly be claimed, as it seems to me, that payment made in the Shaber, Reinthal & Co. case should operate to discharge all claim for damages which resulted from both writs. No claim of that kind was made in that case. Beck & Co. were not parties to this action, and were not bound by the adjudication. Had the jury in the case found the damages caused by the wrongful issuing of this writ to have been one thousand dollars, and Shaber, Reinthal & Co. had paid but five hundred dollars of the amount, Miller, on any theory of the case, would have been entitled to recover of Beck & Co. for damages caused by the writ in excess of five hundred dollars, but Beck & Co. would not have been bound by this adjudication in the other case; and on what principle can it be held that Miller would have been estopped, by that adjudication, to recover of Beck & Co. the amount of damages he had actually sustained for which payment had not been made? Had the firms been joint wrongdoers, the payment of a part of the damages sustained by Miller would not have discharged the other from liability, unless payment was made in full satisfaction of the claim. This is shown by authorities cited in the opinion of the majority. Hence it appears to me, inasmuch as no attempt was made in the Shaber, Reinthal & Co. suit to recover damages caused by the Beck & Co. writ, it should not be said, as a matter of law, that payment of the damages recovered in that case operated as a full discharge of all claim for damages under both writs. I also think that the parties to this action are not, as to each other, bound by the adjudication in the other action, and that the defendants cannot rightly ask for more than that credit be



given in this action for what was actually paid in the other on account of damages caused by the Beck & Co. writ, and such credit was allowed under the charge of the district court. That would not allow the plaintiff to recover more than the amount to which he is entitled, but would limit him strictly to a recovery for actual damages and for the malicious suing out of the writ. Whether the writ was sued out maliciously is not shown, but, under the charge of the court, the jury was authorized to award the plaintiff exemplary damages, if actual damages had been shown. Since the firms were not joint trespassers, an allowance for the malicious suing out of the Beck & Co. writ was not and could not have been involved or adjudicated in the Shaber, Reinthal & Co. case. The jury found specially in that case that the writ was not sued out maliciously, but no finding of that character was made in this case.

It is said in the opinion of the majority that, if Miller sued in each action for a conversion of the property, he could not have payment for it twice. The claim of Miller in the Shaber, Reinthal & Co. case was on the attachment bond to recover, among other things, for the seizure and sale of the stock of merchandise; and the court charged the jury, not that it might allow as for a conversion of the property, but for loss or depreciation in its value, and that, if it had been sold by the sheriff for its full value, no damage, by reason of loss or depreciation, had been sustained. I do not think there is any ground for claiming that the effect of the adjudication was to hold that the title to the attached property was vested in the attaching creditors. The record shows that the jury was fully warranted in finding that the plaintiff did not, in the allowance made in the Shaber, Reinthal & Co. case, receive the full amount to which he was entitled for damages cause by the two writs. Three witnesses testified for the plaintiff respecting the value of his stock when seized under the writs. The plaintiff testified that the stock was then worth about three thousand three hundred dollars, and that the value of the stock and tools,

ladders, and other articles, was about three thousand nine hundred dollars. Another witness testified that the stock, when seized, was worth three thousand two hundred dollars, and the third testified that it was worth two thousand eight hundred dollars. A traveling salesman of Beck & Co. testified that he examined the stock about two weeks after it was attached, and that it was reasonably worth, in Council Bluffs, about five hundred dollars, and could have been replaced new for a sum not exceeding five hundred and seventy-five dollars. Another witness testified for the defendants that the stock was worth, when seized, between seven hundred dollars and eight hundred dollars. It is admitted that the stock was sold by the sheriff as perishable property, about two months after it was seized, for five hundred and twenty dollars. The record does not disclose what was done with the tools, ladders, and other articles not included in the stock, and which are shown to have been worth about six hundred dollars. The plaintiff testified that none of them were returned to him. The estimates given are exclusive of six hundred dollars, which the plaintiff testifies was the value of the good will of his business, which seems to have been destroyed by the attachment. It appears to me clear that the plaintiff did not in the *Shaber, Reinthal & Co.* case, recover the full amount of his loss; that the amount allowed by the jury in this case was fully warranted by the evidence, and, with that recovered from the other firm, did not exceed his actual loss; and that the decision of the majority operates as a denial of justice. The cases of *Ennis v. Shiley*, 47 Iowa, 552; *Engleken v. Webber*, 47 Iowa, 558; and *Jackson v. Noble*, 54 Iowa, 641, although not precisely in point, tend to support the views I have expressed. The case of *Metz v. Soule* 40 Iowa, 236, was governed by rules of law not applicable in this case; and the case of *Lovejoy v. Murray*, 3 Wall. 1, involved a joint trespass. In my opinion, the decision of the majority is contrary to established and well recognized legal principles, and the judgment of the district court should be AFFIRMED.

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113 745

D. W. GALLAHER V. MAHLON HEAD AND MADISON HEAD,  
Appellants.

**Limitation of Actions: TAX TITLE: *Attornment.*** The statute of limitations does not bar the holder of a tax title from enforcing his claim, if the holder of the fee makes a written surrender and attornment to him before the statute has run.

**SAME.** The statute limiting a tax purchaser's right to recover the land begins to run when his right to a deed accrues, though he does not take one until thereafter, if the fee owner then occupies the land, and has done so since the sale; and the running of the statute is not interrupted by a change in the fee title during the period of limitation.

**OCCUPANCY.** The occupancy by the fee owner through tenants, which will set the statute of limitations in motion and keep it running against a tax title, need not be continuous by the same person.

**WASTE.** A tax purchaser is entitled to recover of the fee owner for timber which the latter tenant, acting under a right which the owner pretended to confer, cut while the land was wrongfully withheld from the purchaser.

**Tax Sale: FRAUD: *Evidence.*** The existence of a fraudulent combination among bidders at a tax sale cannot be inferred from the fact that there was little competition, though a number of bidders were present, several of whom bid on the same tract.

**Trial: AMENDMENT.** It is not error to refuse an amendment to an answer tendering a new issue after plaintiff has closed his evidence and argument.

**Review on Appeal.** On appeal in a law action the judgment will be sustained if it has material support in the testimony.

*Appeal from Greene District Court.*—HON. S. M. ELWOOD,  
Judge.

WEDNESDAY, MAY 24, 1899.

THIS action, which is at law, involves the title to forty acres of land. There was a trial to court, and judgment for plaintiff. Defendants appeal.—*Affirmed.*

*Rose & Henderson* for appellants.

*J. A. Gallaher* for appellee.

WATERMAN, J.—Plaintiff's claim is based upon a tax title. The tax sale under which she claims was had December 3, 1888. The deed was issued June 7, 1892, and recorded the same day. This action was begun December 23, 1896. The principal question involved is whether the action was barred by the statute of limitations. Plaintiff was entitled to a deed December 3, 1891. The five-year limitation of the statute would expire December 3, 1896.

1 The general rule is that the statute begins to run from the time the purchaser is entitled to a deed. *Innes v. Drexel*, 78 Iowa, 253; *La Rue v. King*, 74 Iowa, 288. It has been held, however, that where the land is unoccupied when the deed is taken the tax purchaser will be deemed to have constructive possession, and his failure to take a deed when entitled to do so will not prevent the statute running in his favor. *Griffin v. Turner*, 75 Iowa, 250, and cases cited therein. But in the case at bar the evidence without material dispute shows that this land was occupied by the fee owners, through tenant, when the sale was made and since. If we correctly understand the argument of appellee, she claims that the occupancy which will set the statute in motion and keep it running in favor of the party in possession must be a continued possession by the same person; that, if the fee title changes hands during the five years immediately succeeding the date when the deed was due, the bar of the statute cannot be set up by the fee owner as against the tax purchaser, based upon the lapse of such period. She relies upon *Strabala v. Lewis*, 80, Iowa, 510. But in that case the land was wholly unoccupied at the time of the sale, and the fee owner did not take possession until after the tax deed was recorded. All that was held there was

2 that, under such circumstances, the negligence of the tax purchaser would not inure to the benefit of the owner of the patent title. If the land occupied by the fee owner when the sale is made and the right to a deed

accrues, the statute is set running, and no change of title will interrupt it. But there was evidence here from which the court could have found that, just prior to the time when the period of limitation expired, the defendants, acting through Mahlon Head, recognized plaintiff's title, and, through negotiations for its purchase, or for a lease of the lands, induced plaintiff to believe that her right was not questioned, and by this means secured the few days' delay

of which he now seeks to take advantage. There  
3 was a conflict of evidence on this point, but, as this is a law action, we should sustain the judgment if it has material support in the testimony, as it undoubtedly has in this respect. If defendants had paid rent to plaintiff before the expiration of the five-year limitation, it would have been such a surrender of possession on their part as would have stopped the running of the statute. In our opinion, the evidence justified the finding of a written surrender and attornment of defendants to plaintiff. The doctrine of estoppel would seem to apply. *McNamee v. Moreland*, 26 Iowa, 96; *Lucas v. Hart*, 5 Iowa, 415.

II. What we have said covers several of the assignments of error. We now pass to others. After the evidence was closed, and plaintiff's argument concluded,  
4 defendants offered an amendment to the answer tendering a new issue, and the court refused permission to file it. There was no error in this ruling. *Emerson v. Converse*, 106 Iowa, 330.

III. Evidence was received as to the value of timber cut from this land during the time it is claimed to have been wrongfully held by defendants. As plaintiff claimed  
5 damages in her petition for waste committed, it is manifest that this evidence was admissible, for it appears this was done by a tenant of defendants, under rights which they pretended to confer.

IV. Most of the remaining assignments, which are quite numerous, relate to rulings upon evidence. We have

examined them carefully, and discover no error in the action of the court. One defense to the tax deed is that there was a fraudulent combination among the bidders at the sale. There is no evidence of this, save inference from the manner in which the bids were made as testified to by the treasurer. The substance of what he says is that there was but little competition, although quite a number of bidders were present. He admits, however, that at times several persons bid on the same tract. We do not think the facts bring this case within the rule announced in *Johns v. Thomas*, 47 Iowa, 442. A finding of fraud cannot be based on so doubtful an inference.

Some objections are urged to the language of the court in making its findings. It would be of no benefit to any one for us to do more than announce our conclusion on these contentions, which is that they are without merit.—

AFFIRMED.

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SAMUEL S. RIDDLE V. EDWARD RUSSELL AND HENRY CLARK,  
Appellants.

**Payment: EVIDENCE.** A holder of a note procured from a bank which had marked it "Paid," with a cancellation stamp has the burden of proving that he bought the note, the stamp being presumptive evidence of payment.

**SAME.** A stranger accepting a note from the bank which had marked it "Paid" after he paid its amount to the bank, without anything being said about his purchasing it, cannot recover from a surety thereon.

**SAME.** One who has paid a promissory note, although for the benefit of the maker, cannot sue upon it.

**Instructions: REQUEST.** It is error to refuse a specific instruction as to what a plaintiff has the burden of proving, where the only instruction given on the subject is that plaintiff has the burden of proving the "material allegations" of his petition, without stating what allegations are material.

*Appeal from Linn District Court.*—HON. WILLIAM G. THOMPSON, Judge.

WEDNESDAY, MAY 24, 1899.

ACTION upon a promissory note. Plaintiff claims to be an indorsee thereof. The note was made by defendant Russell to Smyth Bros., defendant Clark signing as surety. It was held by the Mt. Vernon Bank as collateral security for a debt of the payee. The defense is that plaintiff paid the same to the Mt. Vernon Bank, and that upon its delivery to him it was duly stamped across its face as paid. There was further defense in behalf of Clark, as surety, of laches on the part of plaintiff. The case was tried to a jury. From a verdict and judgment in plaintiff's favor, defendants appeal.—*Reversed.*

*Rickel & Crocker* for appellants.

*Charles W. Kepler* for appellee.

WATERMAN, J.—The court was warranted by the evidence in refusing to submit to the jury the separate defense of the surety.

On the other branch of the case, it was undisputed that the bank held this paper as collateral security for a debt due from Smyth Bros., and there was evidence on the part of defendant tending to show that it was not transferred to plaintiff, but that he paid it, and after cancellation it was delivered to him. On this issue the court gave an instruction as follows: "If you find from the evidence that defendant Russell arranged with the plaintiff herein to borrow the money of him to pay the note, and you further find that Russell did borrow the money of plaintiff, and that the money so borrowed was used in payment of said note, then your verdict should be for the defendant; but if you are satisfied from the evidence that plaintiff advanced the money

to take up said note and purchase the same, and did so purchase the same, your verdict should be for the plaintiff for the amount you find due on the note sued upon."

1 This instruction is excepted to by appellants. This paragraph is correct, as far as it goes, but defendants were manifestly entitled to a broader statement of the law. If the note was paid by plaintiff, he can maintain no action upon it, even though Russell did not borrow the money with which the payment was made. The instruction is the only one given upon the issue of payment. As to the burden resting upon plaintiff, the jury was told that plaintiff must establish by a fair preponderance of the evidence the "material allegations" of his petition. No attempt was made to define or specify what allegations are material.

' Defendants asked, and the court refused to give, these two instructions. 4: "You are instructed that the burden of proof is on the plaintiff to show by a preponderance of the evidence that the note was not paid as shown by the

2 indorsement thereon, and that he purchased the same as alleged in his petition, and did not pay the same according to the said indorsement thereon." 5: "If you find from the evidence that the plaintiff paid the money on the note in controversy to the bank, and that the bank thereupon marked it 'Paid,' and that plaintiff accepted the same, and that nothing was said on the part of the bank about selling the same to plaintiff, then and in that event you will find for defendant Clark." It was error to refuse these. The first is specific as to the burden of proof, and the other announces a rule of law about which there can be no dispute, and which is not contained in the charge as given. The cancellation stamp on this note was presumptive evidence of payment. *Thomassen v. Van Wyngaarden*, 65 Iowa, 687. Without regard to where the money was obtained that was given for this paper, or how it came to be paid, the burden was on plaintiff to overcome this presumption.—REVERSED.



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114	82

108	594
116	2

108	594
128	175

108	594
133	224

108	594
137	252

GEORGE W. JOHNSON *et al.* v. MARIA A. BODINE *et al.*,  
Appellants and PHOEBE J. FLINT, Appellant.

**Descent and Distribution: HEIRS, PER CAPITA AND PER STIRPES.**

Where a testator leaves his estate to his two brothers for life, with

- 1 the remainder to be "divided between my heirs-at-law," the heirs, consisting of children and grandchildren of deceased's brothers
- 2 and sisters, take per stirpes, and not per capita, unless the will manifests a different intention.

**Heir: BASTARD: Recognition.** The children of an illegitimate daughter of testator's brother are entitled to a share in a devise

- 1 to his heirs, in the right of their grandfather, when he and their
- 3 mother are both dead, and she had been recognized by her father as his child, so as to be entitled to inherit from him.

*Appeal from Page District Court.*—HON. N. W. MACY,  
Judge.

WEDNESDAY, MAY 24, 1899.

ACTION for the partition of real estate. The trial court established and confirmed the respective interests of the parties, and directed a sale of the property. From that part of the decree fixing the interests of the various parties, defendants Phœbe J. Flint appeals, and from the decree fixing the plaintiff's interest certain of the defendants appeal. As Phœbe J. Flint first perfected her appeal, she will be called "appellant."—*Modified.*

*T. E. Clark* and *John W. Fisher* for appellant Phœbe J. Flint.

*Parslow & Scott, Levant D. Lester, and O. C. Greene* for appellants Nellie J. Bushman and others.

*J. E. Hill* and *John R. Good* for appellees.

DEEMER, J.—C. D. Lester died, testate, seised of the real estate sought to be partitioned, on the 5th day of

October, 1885. His will, was admitted to probate in November of that year, and contained the following, among other provisions: "Fourth. I do give and bequeath unto my beloved brother Isaac J. Lester one-half of my entire estate, both real and personal, with remainder to my heirs at law, during the life of my said brother; the trust of my brother for his natural life. Fifth. I do give and bequeath unto my beloved brother Garra Kimble Lester the use, income, and profit of one-half of my entire estate, both real and personal, during his natural life. The remainder as hereinafter stated. Sixth. It is my will that at the death of my brothers, Isaac J. Lester and Garra Kible Lester, that my entire estate, both real and personal, be divided between my heirs at law." Isaac J. Lester and Garra Kimble Lester, named in the will, both died since the death of the testator, and prior to the commencement of this action. The testator was never married, and his parents departed this life prior to the death of the testator. He left surviving him two brothers, Isaac J. and Garra Kimble, and the issue of three deceased sisters, to-wit: Catherine E. Caner, Amy Prime, and Phœbe J. Flint, Sr. Isaac J. Lester left surviving him three children, all of whom were living at the time of the testator's death. The other brother left surviving him four children, who were also living at the time the testator died, and the issue of three other children, who were alive on the 5th of October, 1885. One of these last-named children died after the death of the testator, leaving a husband, but no issue. Another died after the testator's death, leaving a husband and two children. The third of these children was an illegitimate daughter of Garra Kimble Lester. This daughter, who bore the name of Laura J. Johnson, died in the year 1891, leaving four children, each and all of whom were living at the time of the testator's death. It is admitted that Garra Kimble Lester recognized Laura J. Johnson to be his daughter, and that this recognition was in writing, and general and notorious. The

husband of Laura J. Johnson also survived her, but he devised all his interest in the testator's property to his children. Catherine Caner, a sister of the testator, who died before the testator, left four children surviving her, and these children were all alive when the testator died. Amy Prime and another sister, who died before the testator, left four children surviving, two of whom died prior to the death of the testator, without issue. Phœbe J. Flint, Sr., also a sister of the testator, died before he did, leaving a son, Garra K. Flint, who also died prior to the time of the testator's death, leaving as his only heir the defendant and appellant Phœbe J. Flint, who is now living, and who is the

sole and only representative of this branch of the  
1 Lester family. The case involves a construction of that part of the will which we have quoted. On the one side it is insisted that the heirs take per stirpes, and not per capita, and that Phœbe J. Flint is entitled to one-fifth of the property, instead of the one-seventh which the trial court awarded her; while on the other hand it is contended that the per capita distribution ordered by the court is correct, and that the decree as to this appellant should be affirmed. Again it is insisted that the heirs of the illegitimate daughter of Garra Kimble Lester are not entitled to take under the will, because they could not have inherited from the testator; while counsel representing these parties, who will be designated the "Johnson heirs," argue that as Lester recognized Laura J. Johnson, during his lifetime, as his child, she and her heirs are entitled to inherit from him to the same extent and in the same manner as if she had been his legitimate child, and that, as they were entitled to inherit from him, they are also entitled to inherit property belonging to his brother, and are therefore entitled to take under the will of C. D. Lester. It will be noticed that the will directs that testator's estate, both real and personal, be divided between his heirs at law. In the recent case of *Kling v. Schnellbecker*, 107

Iowa, 636, we held that when an estate is to be divided equally between certain persons, whether specifically named, or designated by more general terms, as the children or heirs of certain persons, the language imports the taking of an equal share by each legatee, in the absence of other provisions showing a contrary intention, and that they take per capita, and not per stirpes. It has been truly said, however, that "this rule will yield to a very faint glimpse of a different intention in the context." See 2 Jarman Wills (Rand. & T. Ed.) p. 757, and cases cited. But the facts in the *Kling Case* are so different from those in the case at bar that neither the rule nor its exception applies. Here there is no division into classes, as in that case, and the part each of the heirs shall take is not prescribed. The will provides that the testator's entire estate shall be divided between his heirs at law. Resort must be had to construction to ascertain the objects of his bounty, and to determine the amount of the estate each beneficiary is entitled to receive. Who are testator's heirs at law? That question must be solved by turning to the statutes of descent, for "an heir is he upon whom the law casts the estate immediately upon the death of the ancestor." And as a general rule, parol evidence is not admissible to vary the meaning of the word. O'Hara, Wills, 297; *Weatherhead v. Baskerville*, 11 How. 329. Guided by these principles, we have no difficulty in determining, in this connection, who were the objects of the testator's bounty. But the more important question remains, do these heirs, standing in different degrees of relationship to the testator, take per capita and share alike, or do they take as heirs would have taken by the rules of descent? The authorities furnish a rule which answers this proposition. Thus, in the case of *Daggett v. Slack*, 8 Metc. (Mass.) 453, Chief Justice Shaw, speaking for the court, said: "The court are of opinion that, according to the established rule of law, a devise to 'heirs,' whether it be to one's own heirs or to the heirs of a third person, designates, not only the persons who

are to take, but also the manner and portions in which they are to take, and that, when there are no words to control the presumption of the will of the testator, the law presumes his intention to be that they shall take as heirs would take by the rules of descent. Therefore, in the present case, where there are no such words, the true construction of the will is that the grandchildren take per stirpes, and not per capita. \* \* \* Such presumption, however, will  
2 be easily controlled by any words in the will indicating a different intention of the testator; as if, after a devise to 'heirs,' it be added 'in equal shares,' or 'share and share alike,' or 'to them and each of them,' or 'equally to be divided,' or any equivalent words, intimating an equal division, then they will take per capita each in his own right. But, when there are no such words, the presumption is that the testator referred to the familiar law of descents and distributions to regulate the distribution of his bequest." See, also, *Cummings v. Cummings*, 146 Mass. 501 (16 N. E. Rep. 401); *Rand v. Sanger*, 115 Mass. 124; *Holbrook v. Harrington*, 16 Gray, 102; *Houghton v. Kendall*, 7 Allen, 72; *Baskin's Appeal*, 3 Pa. St. 304; *Cook v. Catlin*, 25 Conn. 387; *Spivey v. Spivey*, 37 N. C. 100; *Osburn's Appeal* 104 Pa. St. 637; *Schouler Wills* (2 ed.), section 539; *Woodward v. James*, 115 N. Y. 346 (22 N. E. Rep. 150); *Richards v. Miller*, 62 Ill. 417; *Fisher v. Skillman*, 18 N. J. Eq. 229; *Jackson v. Alsop*, 67 Conn. 249 (34 Atl. Rep. 1106); *Thomas v. Miller*, 161 Ill. Sup. 60 (43 N. E. Rep. 848); *Dukes v. Faulk*, 37 S. C. 255 (16 S. E. Rep. 122); *Conklin v. Davis*, 63 Conn. 377 (28 Atl. Rep. 537). Applying the rule thus announced and so firmly established to the facts, we think it clear that Phœbe J. Flint is entitled to take per stirpes, and that her share should be fixed at one-fifth of the estate. The case of *Furenes v. Severtson*, 102 Iowa, 322, relied upon by appellee, is not in point.

II. The other point presented by the cross appellants with reference to the right of the Johnson heirs to take under

the will seems to be settled by the case of *McGuire v. Brown*, 41 Iowa, 650. In that case it is squarely held that an illegitimate child inherits from her mother, and that the

3 fact of the mother's death before descent will not prevent the child from inheriting her share of the estate. See, also, *Milburn v. Milburn*, 60 Iowa, 411. While much that is said in the case of *In re Sunderland*, 60 Iowa, 732, seems to run counter to these cases, yet a careful examination of the opinions will show that there is no real conflict. But for the *McGuire Case*, the writer of this opinion would be inclined to the view that as the Johnson heirs do not inherit from their mother, but through her, they are not entitled to take under the will. As there is a conflict in the authorities upon the proposition, however, and as the rule announced in that case is a rule of property, and has stood for more than twenty years, it is better that it be not disturbed. The conflicting authorities to which we have referred will be found collated in note to *Croan v. Phelps*, 94 Ky. 213, 23 Lawy. Rep. Ann. 753 (s. c. 21 S. W. Rep. 874). It follows from what we have said that the judgment and decree of the district court is REVERSED on the appeal of Phoebe J. Flint, and AFFIRMED on the appeal of the other defendants.

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### H. G. DUNCAN v. J. B. GRAY, Appellant.

**Plea and Proof:** CONTRACTS EXPRESS AND IMPLIED. Plaintiff cannot recover on a petition showing an implied promise to pay for services when it appears that they were rendered under an express agreement, and a breach thereof, which would entitle plaintiff to recover on a *quantum meruit*.

**INSTRUCTIONS.** An instruction which permits the jury to find on an issue not raised by the pleadings, and concerning which there is no controversy, is erroneous.

108	599
123	604
148	598
124	597
108	599
123	607

*Appeal from Franklin District Court.*—HON. B. P. BIRD-  
SALL, Judge.

WEDNESDAY, MAY 24, 1899.

ACTION for wages. The defendant appeals from judgment on a verdict in favor of the plaintiff.—*Reversed.*

*E. P. Andrews* for appellant.

*B. H. Mallory* and *John M. Hemmingway* for appellee.

LADD, J.—The petition simply alleged that the plaintiff entered the service of the defendant in May, 1896, training his horses, and continued until July of that year, stated the value of his services, and prayed for judgment. The defendant answered that the services were rendered under an oral contract, by the terms of which the plaintiff's compensation was to be one-half of the earnings of the horses received from racing, and that the defendant had complied with all the conditions of his agreement. In reply,  
1 the plaintiff admitted the contract substantially as pleaded, but averred that the defendant had broken three conditions: (1) had failed to furnish an assistant to care for the horses; (2) had refused to enter them at races; and (3) had not furnished the full number. It will be observed, then, that the only issues to be determined were those arising out of an express oral agreement, and that plaintiff was only entitled to recover on a *quantum meruit*, in event the defendant failed to fulfill his part of the contract. And it may be added that both parties testified to making such a contract, differing only as to details. No recovery could be had, then, on a mere implied promise to pay. *Lines v. Lines*, 54 Iowa, 602; *Walker v. Irwin*, 94 Iowa, 454; *Wernli v. Collins*, 87 Iowa, 551. Nevertheless,  
2 the court instructed the jury: "If you find from the evidence that plaintiff was requested by the defendant to perform the services sued for, and there

was no other contract between them, and that, in pursuance of such request, he did render the services as charged, then, of course, the plaintiff will be entitled to recover, at your hands, the fair and reasonable value of the services so rendered, as shown by the evidence." This was emphasized by submitting whether a contract had been made, in the sixth and seventh instructions, and elaborating the law on recovery for services rendered on request, in the third paragraph of the charge. This court has often held that instructing on an issue not raised by the pleadings, and bearing on which no evidence has been introduced, is error. *Storrs v. Emerson*, 72 Iowa, 390; *Miller v. Railway Co.*, 76 Iowa, 318; *Stein v. Seaton*, 51 Iowa, 18; *Trapnell v. City of Red Oak Junction*, 76 Iowa, 744; *Troughear v. Coal Co.*, 62 Iowa, 576; *Wall v. Railroad Co.*, 89 Iowa, 193; *Blaul v. Tharp*, 83 Iowa, 666; *Whitsett v. Railway Co.*, 67 Iowa, 155; *Negley v. Cowell*, 91 Iowa, 257; *Stein v. City of Council Bluffs*, 72 Iowa, 180; *Aznoe v. Conway*, 72 Iowa, 568; *Deeds v. Railway Co.*, 74 Iowa, 154. This might be urged to have been without prejudice, inasmuch as the agreement was admitted in the reply, and all parties testified to it. But, in spite of this, the court permitted, by the instruction, a finding to the contrary, and the jury might well conjecture that there was some basis for such a conclusion, else it would not be authorized. The record is such as to suggest the possibility that the privilege granted of ignoring the evidence and the issues made by the two parties was not overlooked.—REVERSED.

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MARY A. LAWLESS V. ANNIE M. STAMP and JOSEPH STAMP,  
Appellants.

108	601
4124	378
108	601
128	329

**Evidence:** RECITALS IN DEED. Recitals in a receiver's deed of his appointment, the order of sale, and the sale to grantee, are not, as against a third person, *prima facie* evidence of his appointment  
1 and authority to make the conveyance, and the court's indorse-



ment of its approval on such receiver's deed is not of itself sufficient to dispense with proof of the facts recited. *Henderson v. Robinson*, 76 Iowa, 608, overruled.

**Quieting Title: DEMAND: *Attorney's fees.*** Under laws Twenty-fifth General Assembly, chapter 108, providing that if, before action brought to quiet title, plaintiff shall request of defendant a quit-  
2 claim deed, and tender the expense thereof, and the latter fails to comply, the court may, if plaintiff is successful, tax attorney's fees for him, such fees cannot be taxed unless the request was made directly of defendant.

**RULE APPLIED.** Demand for deed before bringing suit to quiet title,  
2 upon an agent of defendant not authorized to make it, is not sufficient to authorize a taxation of any attorney's fee against defendant.

*Appeal from Black Hawk District Court.*—HON. A. S. BLAIR, Judge.

WEDNESDAY, MAY 24, 1899.

ACTION in equity to quiet title. Decree for plaintiff. Defendants appeal.—*Reversed.*

*H. C. Hemenway* for appellants.

*H. E. Long* for appellee.

WATERMAN, J.—The property in dispute consists of lots 6, 7, and 8 in block 8 in Cameron's Second addition to Cedar Falls. Both parties claim title through one Jeremiah Mosher. On May 17, 1869, Mosher executed a mortgage on the property to the Charter Oak Life Insurance Company. In an action in which Annie Stamp, the present defendant (then Annie Kaynor), was a defendant, this mortgage was foreclosed; and at a sale under such decree the property was bid in by the insurance company named, and in due time a deed was executed to it therefor. Plaintiff claims title through a deed from the receiver of said company. Defendant's title comes in this wise: Mosher, by warranty deed, conveyed to one Leddington, subject to the mortgage men-

tioned. Leddington, by like deed, also subject to the mortgage, conveyed to one Winter. Winter and his wife on December 20, 1875, conveyed by similar deed, but with no mention of the mortgage, to defendant Annie Stamp, by her then name of Kaynor.

II. The principal question discussed by counsel is whether the recitals in the deed from the receiver of the Charter Oak Life Insurance Company are *prima facie* evidence of his appointment as such, and of his authority to make the conveyance. This deed recites the pendency  
1 of an action in the circuit court of the United States, wherein the Charter Oak Life Insurance Company was plaintiff, the appointment of the grantor as receiver, an order of sale, and the fact of such a sale to plaintiff. The deed also bears this indorsement: "This deed of conveyance is hereby approved. O. P. Shiras, Judge." The admission of this instrument in evidence was objected to by appellants, and the point is now urged that there should have been preliminary proof made of the facts recited, so far as relates to the grantor's right to convey. Appellee relies upon the cases of *Beal v. Blair*, 33 Iowa, 313, and *Henderson v. Robinson*, 76 Iowa, 603, as supporting her claim that the recitals in the deed were *prima facie* evidence of all the facts therein stated. We are not inclined to accept the doctrine thus contended for, on the authority of these cases. In *Beal v. Blair*, the grantor's authority as trustee to make the deed was shown *aliunde*, and the holding was that the recitals in the instrument were *prima facie* sufficient to show that the requirements of the trust deed under which he acted had been complied with. *Henderson v. Robinson* lends some support to appellee's contention. The deed in that case was made by a commissioner appointed by the court in which the action was tried, and the ground of the decision is that a court will take judicial notice of the contents of all its own records. This was announced as a rule of evidence. But it has been overruled, in effect, in this respect, by *Shipley v.*

*Reasoner*, 87 Iowa, 555, in which this court held that it will not assume, as matter of evidence, knowledge even of the contents of a pleading in the case on trial, when it has been superseded by another pleading. The doctrine generally recognized is that recitals in a deed are not evidence against a person not claiming under it. 1 *Greenleaf Evidence*, section 23; 1 *Phillips Evidence*, 217; *Starkie Evidence*, 578; *Carver v. Jackson*, 4 Pet. 1-83. In *Hughes v. Holliday*, 3 G. Greene, 30, we held that a recital in a deed, purporting to be executed by an attorney in fact, of the existence of a power of attorney, was no evidence of such authority, against a stranger to the deed; that the power of attorney should be produced, in order to lay the foundation for the introduction of the deed in evidence. So we have held that a recital in a deed that the grantors are the heirs of another is no evidence of such a fact. *Costello v. Burke*, 63 Iowa, 361. See, also, *Soukup v. Investment Co.*, 84 Iowa, 448; *McCarty v. Rochel*, 85 Iowa, 427; *Potter v. Washburn*, 13 Vt. 558. In the absence of a statute, the recitals in an official deed, even, are not evidence, against strangers, of the facts stated. *Bowen v. Bell*, 20 Johns. 338; *Seechrist v. Baskin*, 42 Am. Dec. 251. But appellee claims something for the deed in question because of the indorsement of approval thereon. Such an indorsement is not in itself sufficient to dispense with evidence of the facts recited in the instrument upon which rests the grantor's authority to convey.

III. The plaintiff claimed attorney's fees, under chapter 103, Laws Twenty-fifth General Assembly, and was allowed the sum of fifty-five dollars by the trial court. Additional fees are now claimed on account of this appeal. By the statute mentioned it is provided that if the plaintiff, before action brought, shall request of the defendant a quitclaim deed, and tender the sum of one dollar and twenty-five cents, as the expense thereof, then, if defendant fails to execute such conveyance, and plaintiff is successful, the court may, in its discretion, tax as part of the costs a reasonable

attorney's fee for the use of plaintiff, not to exceed the sum of twenty-five dollars for the first forty-acre tract or lot, and a further sum, not to exceed fifteen dollars, for each additional forty-acre tract or lot. The request made in this case was in writing, sent by mail. It was directed to defendant Annie M. Stamp, but was received and answered by one

2 George E. Winter, who professed to be an agent for Mrs. Stamp. There is no evidence that Mrs. Stamp had any knowledge of the demand. This statute is penal in its nature. It should be strictly construed. The request for the deed should be made of the party who is to execute the instrument. If it is in any case sufficient to make demand on an agent, it can only be when the agent is vested with power to make a deed. There is no such showing here as to Winter. It does not appear that he had any authority to comply with the request, or to make any response thereto. No attorney's fees should have been allowed.

IV. The objections made by appellee to the record are without merit. As appellee was doubtless misled by the language used in *Henderson v. Robinson*, and thereby induced to rely upon the receiver's deed speaking for itself, we shall remand the case, that she may have an opportunity to offer evidence in its support in the court below.—  
REVERSED.

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J. A. PHILLIPS v. W. A. CRIPS & BROTHER, W. S. CRIPS,  
S. P. CRIPS, ROSE L. CRIPS and ANNA V.  
CRIPS, Appellants.

**Modification of Inte : Contract: EVIDENCE.** Plaintiff claimed that by agreement with defendant the rate of interest on a mortgage was changed from seven to eight per cent. at the time when a second mortgage on the same property was given, on which the interest was seven per cent. Defendant was at all times in default on his interest. The evidence showed a payment by  
1 defendant, after the semi-annual interest on the first mortgage

108	606
109	456

108	606
114	526
108	606
117	622

was due, and before that on the second mortgage was due, of an amount equal to eight per cent., and a payment after the interest on the second mortgage was due of an amount equal to seven per cent. Future payments of interest were of the same character. *Held*, sufficient to show that the interest agreed upon for the first mortgage was eight per cent.

**ALTERATION OF INSTRUMENTS.** Where it is expressly agreed that the  
1 rate of interest on a note shall be changed from seven to eight  
2 per cent., the payee can make the alteration on the note without affecting its validity, though without the knowledge of the payer.

**Appeal: ABSTRACTS. Affirmance.** Supreme Court Rule 20 provides that the abstract shall contain so much of the record as may be necessary to an understanding of the question to be determined. Rule 68 provides that all immaterial matter shall be omitted.  
3 *Held*, that where some thirteen hundred questions and answers are set out in full, and the remaining answers printed in full, simply omitting questions, thereby bringing into the record a mass of irrelevant matter, the court will affirm the judgment, as authorized by Rule 21.

*Appeal from Wapello District Court.*—HON. FRANK  
W. EICHELBERGER, Judge.

.THURSDAY, MAY 25, 1899.

ACTION on a note of ten thousand dollars, dated April 3, 1893, and payable in five years, on which three semi-annual interest payments had been made, and also to foreclose a mortgage securing the same. The mortgage contained a condition that the note should become due on failure to pay the interest promptly. The answer set up that the note had been materially and fraudulently altered by changing the rate of interest from seven to eight per cent., by reason of which it became void, and the defendants pray to go hence with their costs. In reply the plaintiff admitted having changed the rate of interest in the note, as alleged, but averred that such change was made innocently, and in pursuance of an understanding had with the payers. There was a decree for plaintiff as prayed. The defendants appeal.—*Affirmed*.

*W. S. Coen and E. E. McElroy* for appellants.

*McNett & Tisdale* for appellee.

LADD, J.—The plaintiff changed the rate of interest from 7 to 8 per cent. in the ten thousand dollar note, dated April 3, 1893, and secured by mortgage, by drawing two lines through the “seven,” with ink of a color different from that in the body of the note, and writing “eight” above it. No effort whatever was made at concealment.

1 This was done immediately after receiving the four hundred dollar check from the defendants, April 16, 1894, and, as plaintiff insists, in pursuance of an agreement that it should be so changed, made the previous December. Interest at the rate of seven per cent. per annum up to October 3, 1893, had been paid in January, 1894. In December of 1893, by an arrangement with the defendants and the First National Bank of Ottumwa, the plaintiff undertook to carry an additional loan of ten thousand dollars, secured by second mortgage on the same property. The details of the transaction need not be set out, further than to say the plaintiff claims it was then agreed the note secured by the first mortgage was to be changed so as to bear eight per cent. interest, and those secured by the second mortgage were to bear seven per cent. only, and that by some oversight or mistake the first note was not changed, and the last were erroneously prepared to bear eight per cent., instead of seven per cent., as agreed. The defendants, on the contrary, insist that the first note was not mentioned or discussed, and that the notes secured by the second mortgage were prepared in accordance with the understanding then had. It may be added that the material difference in these contentions is something over fifty dollars in interest, resulting from the fact that the notes secured by the second mortgage mature earlier than the first note. A detailed review of the evidence will serve no useful purpose. We shall only mention several

interest payments, which seem very decisive in this controversy. The interest on all these notes was payable semi-annually. That the check of four hundred dollars given April 16, 1894, was in payment of interest on one of these loans is not disputed. At that time interest on the first note was overdue thirteen days, and that on the notes secured by the second mortgage would not be payable until June 20, 1894. On which did defendants intend it should be applied? If on the first note, then they must have proposed to pay interest as plaintiff insists was agreed. Their circumstances were not such as to lead any one to suspect an intention to pay interest in advance. With plaintiff it was always in arrears. Again, they gave a check for three hundred and fifty dollars, in payment of interest, July 10, 1894. At that time the installment on the second mortgage notes had been overdue since June 20, 1894, and that on the first note would not mature until October 3d following. On which did they intend this to be applied,—that due or to become due? If on that which was due, then they only proposed to pay interest at the rate of seven per cent. on the second mortgage notes. This method continued. October 18, 1894, they gave the plaintiff a check for two hundred dollars, and another for like amount December 6th following; and these, very evidently, to pay the interest then due on the first note. On February 8, 1895, they gave a check of two hundred dollars, and on the twenty-eighth of the same month another for one hundred and fifty dollars; and these to pay interest at the rate of seven per cent. on the notes given December 20, 1893. These payments of interest are in exact accord with the theory that an agreement was made as claimed by the plaintiff, and the explanation of defendants, that somehow they did not notice dates when the interest on each loan matured, and only that it should be three hundred and fifty dollars at one time and four hundred dollars the next, is not reasonable. The plaintiff may have informed Crips of the change, and received his approval, soon after it was made; but it

• was undoubtedly not actually seen by him until the last payment of interest, when he conceived the design of avoiding the obligation because of the alteration. This written evidence, however,—the checks, which he prepared,—when considered in connection with the other evidence, has effectually defeated that purpose, and the defendants will be compelled to do as they agreed.

II. The change in the rate of interest from seven to eight per cent., if done fraudulently, would render the note void. *Woodworth v. Anderson*, 63 Iowa, 503; *Bank v. Hall*, 83 Iowa, 645; *Conger v. Crabtree*, 88 Iowa, 536.

2 Even in event of an innocent change without the consent of the payer, recovery cannot be had on the note. *Murray v. Graham*, 29 Iowa, 520; *Eckert v. Pickel*, 59 Iowa, 545. But where it is expressly agreed the alteration shall be made, and this is done by the payee, though without the knowledge of the payer, then an action may be maintained on the note, for no more has been done than to carry out the intention of the parties. See *Grimsted v. Briggs*, 4 Iowa, 559; *Wardlow v. List*, 41 Ohio St. 414.

III. There is another reason for affirming the decree. Section 20 of the rules of this court provides that the abstract shall contain so much of the "record as may be necessary to a full understanding of the questions presented for decision." And rule 68 is, "Preserve everything material

3 else." Much of the abstract before us is merely a printed transcript of the evidence taken. One thousand three hundred and twenty-five questions and answers are set out in full, and apparently the remaining answers are printed in full, simply omitting the questions. A mass of irrelevant matter is included, which we have been compelled to go through, at much sacrifice of time. The preparation of every detail of a case for this court should command the painstaking care of the attorneys having it in charge, and not be intrusted to stenographers and clerks, as is too often



plaintiff rescinded the contract of purchase, and placed the engine in a street of Frankville, where it was delivered to the defendant, and demanded the return of the three notes he had made. He asks judgment for the value of the notes, the horses, and the binders. The defendant admits that he represented to the plaintiff that the engine was in good order, and would do good work if properly handled, and that he agreed to run the engine out on the road to Frankville to a certain school house. The defendant further alleges that the engine was delivered in good order, and that he has performed his part of the agreement.

I. The defendant was permitted to testify in regard to the condition of the engine when he took it from Frankville, what was done to repair it, that he sold it to one Peck, and that it was then in substantially the condition it was in previously when sold to the plaintiff. The defendant was also permitted to show that the engine worked well, and did good work for Peck. We think that evidence was  
1 competent and relevant, as tending to support the claim of the defendant that the failure of the engine, when used by the plaintiff, was due to his mismanagement and lack of skill. The condition of the engine when sold to the plaintiff, and its condition when sold to Peck, were facts of which the defendant had personal knowledge, and of which his knowledge as an expert made him competent to testify, as he did, although his testimony in regard to its condition was in the nature of an opinion. The rule of *Dunham v. Rix*, 86 Iowa, 300, and similar cases, is not applicable to the ruling in question. If the engine, when in substantially the same condition as when delivered to the plaintiff, was in good condition, and did as good work as it was warranted to do, it may well be inferred that the failures of which the plaintiff complains were due to fault on his part, and not to defects in the engine. It is claimed that the defendant did not know the condition of the engine when delivered to the plaintiff, for the reason that he was not with

it at that time, and it was broken while on the road to Frankville; but he inspected the engine when it was at Frankville, and must have known its condition.

II. The appellant complains of rulings on the admission of evidence. The defendant was asked, as a witness, to "state whether or not it is the duty of the engineer in charge of an engine to keep the set screws tight and properly adjusted." He answered: "Yes, sir; it is. I don't think a competent engineer would run an engine with the  
2 piston rod bent." We think the question and the first part of the answer were proper. The appellant complains of the latter part of the answer; but it was not responsive to the question, and no attempt to have it stricken out was made. The defendant was also asked to state whether or not "it would have been impossible for an engine,  
3 in the condition it left your shop, in the hands of a competent engineer on the trip to Frankville, for the pins to have become worn loose, and the valve to have become cut and worn, as you found it when you made that examination in March?" and answered, "No, sir; I think not."

We are of the opinion that, in view of the knowledge  
4 of engines which the witness had shown, the question and answer were proper. A witness was asked as follows: "Tell the jury whether or not McKay was a fit man, or not, to handle an engine of that character." Notwithstanding an objection of the plaintiff, he was permitted to answer: "I made up my mind then and  
5 there that McKay was not a man that could run an engine, and ought not to be allowed to." There was nothing in the issues presented by the pleadings, nor in the evidence submitted, to authorize such a question. The condition of the engine when delivered to the plaintiff was the vital issue, and the treatment to which it was subjected while in his possession was an important matter to determine. The qualification of the plaintiff to run the engine was not an issue in the case, and was involved only so far as he did

not, in fact, manage it properly. The opinion of the witness respecting his qualification was a mere conclusion in regard to a matter which, so far as it could be considered, was for the determination of the jury. The court erred in permitting the question under consideration to be answered, and the error was of a nature to prejudice the plaintiff.

Other questions are discussed, some of which are disposed of by what we have already said, and others are not likely to arise on another trial. It is sufficient to say that the only error shown by the record and discussed in argument is the one to which we have referred. For that the judgment of the district court is REVERSED.

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JAMES J. FITZGIBBON v. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

**Who is a Passenger: PRESUMPTIONS.** One who boarded a train knowing that it was run for a particular class of excursionists and that it did not stop at regular stations, and which was not left at a place where an invitation to all persons to take passage therein could be implied, will not be presumed to have been a passenger thereon.

**SAME: Evidence.** Evidence that plaintiff on inquiring and learning of a conductor of a train, intended for a particular class of excursionists only, when it stopped, said that it would do for him; that he boarded it in the conductor's presence; that he intended to pay his fare, and had the money therefor; and that others not excursionists had been allowed to board the train sufficiently tend to show that plaintiff was accepted as a passenger to justify the submission of that question to the jury.

**ACCEPTANCE BY CONDUCTOR.** The acceptance, as a passenger, by the conductor of a special excursion train, of one not belonging to the excursion, is binding on the company and he will be treated as a passenger, if he did not know that the conductor exceeded his authority.

**Negligence: CARRIERS: Plea and proof.** On a petition alleging nothing but an injury to a passenger because of a carrier's negligence, it is error to submit to the jury the question of plaintiff's right to recover, as a trespasser, for gross negligence.

108 614  
6117 4  
108 614  
6119 261

*Appeal from Monona District Court.*—HON. GEORGE W. WAKEFIELD, Judge.

THURSDAY, MAY 25, 1899.

ACTION at law to recover damages for injuries sustained by plaintiff in a collision between trains on defendant's line of road. Trial to a jury, verdict and judgment for plaintiff, and defendant appeals.—*Reversed.*

*Hubbard & Dawley* for appellant.

*M. F. Harrington* and *Frank Tamisea* for appellee.

DEEMER, J.—In his petition plaintiff alleges that on the eleventh day of July, 1896, he was a passenger upon one of defendant's trains from Logan to Loveland; that after the train started from Logan, through the carelessness and negligence of defendant, it collided with another train owned and operated by the defendant, which was coming from an opposite direction, by reason of which the plaintiff received the injuries of which he complains. All the allegations of the petition were put in issue by a general denial interposed by the defendant. It appears from the evidence that an organization in the city of Omaha, Neb., known as the "Union Pioneer Employes Association," contracted for a train of cars to carry the members of the association and their families from Omaha, by way of Council Bluffs, to Logan, Iowa, and return, on a picnic excursion, the association to pay a stipulated price for the use of the train. The train was made up at Omaha of fifteen or sixteen Union Pacific passenger cars and one baggage car, and, with the excursionists on board, was drawn by a Union Pacific engine to the transfer in Council Bluffs, where the train was taken in charge by a crew of defendant's employes, and drawn to Logan by one of the defendant's engines. In pursuance of the contract, tickets were issued to the association for each car, and

no fares were collected, it being left to the association to see that only members and their families were carried on the train. As the train was not a regular one, and did not run on schedule time, no tickets were sold for passage thereon. On arriving at Logan, the excursionists proceeded to a park in the town to hold their picnic, and the train was placed upon a side track about a quarter of a mile west of the defendant's station house, where it remained during the day. The presence of the picnic party was notorious. The number in attendance was large, and the train was readily recognized as an excursion train by the number of cars, the decorations on the engine, and the place where it was left during the picnic. In the evening the excursionists came back to the train, with a view of starting for home, and, after they had boarded, it was started west from where it had stood during the day. The conductor and engineer both overlooked the fact that a freight train, running on schedule time, was about due from the west, and they negligently started west with their train, which, after proceeding a short distance, collided with a freight train, which was running at a high rate of speed, causing a number of deaths, and injuring a number of persons, among whom was the plaintiff.

No question is made but that the conductor and engineer of this special or excursion train were negligent in not waiting until the freight train had passed, and that their negligence caused the wreck and its consequences. It is not disputed that plaintiff was on the excursion train at the time of the collision, and that he received the injuries complained of in consequence thereof. It is claimed, however, that plaintiff was not a passenger on this train; that he was a mere trespasser, to whom defendant owed no duty except that of not willfully injuring him; and that it is not reponsible in damages for the injuries he received. The trial  
1 court instructed the jury, in effect, that plaintiff, although not a passenger, might recover, if the defendant was guilty of gross negligence in running its

train. This instruction is complained of because not justified by the issues and not supported by the evidence.

It will be observed that plaintiff alleged in his petition that he was a passenger, and that he was injured through the carelessness and negligence of the defendant. This, then, is the duty which he charges the defendant owed him. And his recovery, if recovery he had, must be based upon a breach of this duty. *Humpton v. Unterkircher*, 97 Iowa, 509. In that case it is said: "It is essential, in any suit for negligence, that a particular duty neglected be declared upon. The recovery cannot be had for one breach on a petition counting upon another." In the case of *Way v. Railroad Co.*, 73 Iowa, 463, plaintiff sought to recover, as a passenger, for negligence in making a coupling, and, on appeal to this court, it was held that he was not a passenger. The case being remanded, plaintiff filed an amendment to his petition, retaining the allegations of the original petition, and, in addition, alleging that the injury was caused by the gross negligence of the employees in charge of the train. On the second appeal it was contended that there could be no recovery without proof that plaintiff was a passenger. Answering that contention, we said: "But we think this position is not maintainable; for, while the defendant would have been liable if his intestate had been a passenger and the injury had been occasioned by but slight negligence on its part, it would also, under the statute (Code 1873, section 1307), be liable even though that relation did not exist, if the injury was caused by the gross negligence or mismanagement of the employees in charge of the train. So that the allegation that he was a passenger was redundant, if plaintiff relied upon the averment of gross negligence, as also was that averment if he relied upon the allegation that intestate was a passenger. The petition alleged two states of fact, upon either of which defendant would be liable; and some of its averments, while material to one of these, are redundant as to the other, and plaintiff was entitled to recover if he had

established either of them, even though he had failed to prove the allegations which as to it were redundant. Possibly he could have been required, upon proper motion, to strike one of the averments or to plead the two states of fact, in separate counts. But no such motion was made. Very clearly, we think his right of recovery was not defeated alone by the failure to prove the allegation that the intestate was a passenger at the time of the injury." From 2 this case it clearly appears that there is a marked distinction between an action by a passenger, who may recover for slight negligence, and an action by a trespasser, who may only recover for gross negligence, and that the mere charge of negligence does not carry with it a charge of gross negligence. Plaintiff's petition not only charges that he was a passenger, and that defendant owed him the duty which that relation imposes, but it simply counts on negligence, and, of course, that degree of negligence which the particular duty imposes. It is not even inferentially charged that the defendant was guilty of gross negligence, and it is apparent that the court erred in submitting to the jury the question of plaintiff's right to recover as a trespasser. As there was no charge of gross negligence, we cannot say, as we did in the *Way Case*, that the allegation that plaintiff was a passenger may be treated as redundant. Defendant was not called upon to meet the issue of gross negligence, and therefore the court erred in giving the instruction complained of.

II. The court further instructed that the presumption was that plaintiff was a passenger upon the train at the time he was injured. That rule is no doubt correct when applied to a case where the injured party is found upon a regular passenger train, or upon a train carrying passengers in general, but, as applied to the undisputed facts in this case, it was erroneous. A "passenger," in the legal sense of 3 the term, is one who travels in some public conveyance, by virtue of a contract, express or implied, with

the carrier, as to the payment of fare, or that which is accepted as an equivalent therefor. *Railroad Co. v. Price*, 96 Pa. St. 267. As a general rule, every one on a passenger train of a railroad company, and there for the purpose of carriage, with the consent, express or implied, of the company, is presumptively a passenger. *Railroad Co. v. Thompson*, 107 Ind. 442 (8 N. E. Rep. 18, and 9 N. E. Rep. 357). But there must be some form of acceptance by the company of the person as a passenger. This acceptance need not be direct or express, but may be, and generally is, implied from circumstances. And if the train be a regular passenger train, or a train carrying passengers in general, or a special train fitted for the carriage of persons in general, and a person boards such train without notice that it is reserved for particular persons, no doubt the presumption will arise that he was a passenger. But railroad companies have the right to run trains which do not carry passengers, or to run trains for a particular person, or for a particular class of persons, and, if one boards such a train with notice of its character, he is not presumptively a passenger. Whether he should be treated as a passenger or not depends upon the circumstances of each particular case. See *Wagner v. Railroad Co.*, 97 Mo. 512 (10 S. W. Rep. 486); *Railroad Co. v. Headland*, 18 Colo. Sup. 477 (33 Pac. Rep. 185); *Eaton v. Railroad Co.*, 57 N. Y. 382; *Railroad Co. v. Black*, 87 Tex. Sup. 160 (27 S. W. Rep. 118). If the train is not designed for the use of passengers in general, there is no implied acceptance of one who enters upon it without right, as a passenger. But if it be fitted up for the carriage of passengers, and is placed in such a position that persons may be induced to enter upon it as passengers, then it must be shown that these persons had notice or knowledge that it is not intended for their use. *People v. Douglass*, 87 Cal. 281 (25 Pac. Rep. 417); *Railroad Co. v. Singleton*, 66 Ga. 252; *Rosenbaum v. Railroad Co.*, 38 Minn. 173 (36 N. W. Rep. 477); *Keating v. Railroad Co.*, 97 Mich. 154 (56 N.



W. Rep. 346); *Wagner v. Railroad Co.*, *supra*; *Haase v. Navigation Co.*, 19 Or. 354 (24 Pac. Rep. 238). In the case before us, the evidence shows, without dispute, that the train was chartered and run at a fixed price per car for the exclusive use of the Pioneer Association and their families, and was not for the traveling public. The train was for the exclusive use of the excursionists, and no tickets were sold to the general public for use on this train. While it

4     may be true that plaintiff had no knowledge of the terms of the contract under which the train was chartered, and it may be he did not know that tickets were not sold for that train, yet he did know, or must have known, that it was a special train, run for a particular class of persons; that it did not stop at the regular stations; and that it was not left in such a place as that an invitation was impliedly extended to all persons to take passage thereon. There is no presumption, therefore, that he was a passenger upon this train. His recovery must be on the theory that he was a passenger, notwithstanding the train was a special one. In other words, it must be shown that some agent or employe of the company, having authority, accepted him as a passenger, and permitted him to ride upon the train. The instruction that he was presumptively a passenger was therefore erroneous.

III. It is argued that there is no evidence in the record tending to show that the plaintiff was accepted as a passenger, and that the court erred in refusing to direct a verdict for defendant, and in refusing to give certain instructions asked by it to the effect that plaintiff was not a passenger, and therefore could not recover. The evidence adduced to sustain the proposition that the defendant accepted plaintiff as a passenger is as follows: Plaintiff testified that, desiring to go to Missouri Valley upon the excursion train, he went to the ticket office to get a ticket; that the agent was busy talking with some person in the baggage room, and, being admonished that there was not

much time, he started to the train without asking for a ticket.

He says: "As I went down to the train, I met the  
5 conductor of the excursion train. His name was

Reed. I had known him to be a conductor in the service of the Chicago & Northwestern Company for two or three years. As I started down to the train, I met the conductor just about the end of the far end of the platform, and I asked him if he was going to stop in Missouri Valley, and he said he didn't know,—didn't have his orders yet. I asked him when he would start. He said, 'just as quick as he could get his orders;' and I started to the train then. After that, and before I entered the train, I saw the conductor again up near the front end of the train, near the engine, and had a conversation with him there. I was standing about the front end of the baggage car, close to it. I then again asked him if he was going to stop in Missouri Valley, and he said, 'No; he was going to stop at Loveland, and meet No. 7.' I said that would do me, and I would come back to Missouri Valley on No. 7, and I got right on the train then. The conductor was standing right there by me. There was no crowd to attract his attention. There was two or three, or a few, standing around at that time. It was shortly before the train started. I boarded that train in the presence of the conductor." He further said: "I could not tell a Union Pacific Pioneer excursionist from any other stranger. I was not one myself." He also said: "I intended to pay my fare on the train in which I was at the time of the collision, and had the money with which to pay it." Another witness testifies: "I saw the conductor, and heard him have a conversation with the plaintiff, right close to the engine, just after he handed his orders to the engineer. He handed him something. I couldn't say it was orders. Plaintiff asked him if he was going to stop at the Valley, and he said, 'No, they would pass No. 7 or some other train.' They was going to wait for some train. Jim said that would do him all right; that he would come back on No. 7. Then

Jim got on the train. The conductor was there at the time. The conductor just hesitated, and answered the plaintiff, and then just started off as soon as he was through with the conversation. I believe he was saying something, and didn't wait to finish it before he started off. I suppose he was busy." It also appears that a number of persons got on the train at Council Bluffs, and rode to Logan, some of whom were members of the association and their families residing in that city, and others were persons joining friends among the excursionists. A few persons got on at Missouri Valley, and were carried to Logan, and a number of persons, who had come from Missouri Valley by regular train, boarded the excursion train to return to Missouri Valley, and were injured in the collision.

We think this evidence, in connection with some other circumstances disclosed, justified the court in submitting the question as to plaintiff's being a passenger, by reason of his acceptance as such by the conductor, to the jury.

6 Even if the train was not made up for the carriage of passengers in general, the defendant, through its conductor, had the right to accept such passengers; and, if the conductor did accept the plaintiff as such passenger, he will be treated as such, in the absence of notice of knowledge on his part of any limitations upon the conductor's authority. See *Railroad Co. v. Wheeler*, 35 Kan. Sup. 185 (10 Pac. Rep. 461); *Railroad Co. v. Yarbrough*, 83 Ala. 238 (3 South. Rep. 477); *Wilton v. Railroad Co.*, 107 Mass. 108; *Sherman v. Railroad Co.*, 72 Mo. 62; *Everett v. Railway Co.*, 9 Utah, 340 (34 Pac. Rep. 289); *Railroad Co. v. Muhling*, 30 Ill. 9; *Railroad Co. v. Frazer*, 55 Kan. 582 (40 Pac. Rep. 923); *Dunn v. Railway Co.*, 58 Me. 187; *Creed v. Railway Co.*, 86 Pa. St. 139. For the errors above pointed out, the judgment of the district court is REVERSED.

GRANGER, J., absent, and taking no part.

WATERMAN, J. (dissenting.—I do not agree with the majority in what is said in the second division of the foregoing opinion. It seems to be assumed that the instruction treated of was given as a conclusion based upon all the evidence in the case; but this is not correct. The instruction, in its material part, is as follows: "One riding on a railroad car is presumed, *prima facie*, to be there lawfully, having paid, or being liable when called on to pay, his fare; and where one enters a railroad car in good faith, for the purpose of taking passage thereon, in a train carrying passengers, intending to pay his fare when called upon, he becomes a passenger, though no fare has in fact been paid." Following this, and in the same paragraph of the charge, it was left to the jury to say, under proper directions, whether this presumption was rebutted or overcome by the facts disclosed in evidence, as to the character of this train, so far as known to Fitzgibbon, and the circumstances under which he took passage. The instruction is sustained by authority. *Fetter Carriers of Passengers*, 1195; *Creed v. Railway Co.*, 86 Pa. St. 139; *Railway Co. v. Books*, 57 Pa. St. 339; *Dewire v. Railway Co.*, 148 Mass. 343 (19 N. E. Rep. 523); *Whitehead v. Railway Co.*, 99 Mo. Sup. 263; 6 L. R. A. 409 (11 S. W. Rep. 751). The case will have to be reversed for the error in submitting to the jury the issue of gross negligence, but in all other respects I think the action of the trial court was correct.

ROBINSON, C. J., concurs in this dissent.

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108	623
f133	21

ELWOOD HADLEY *et al.*, Appellants, v. ALLEN STALKER *et al.*

**Gifts: TIME MADE.** *Rights of creditors.* A grantor, in consideration of love and affection, executed a deed of a stock farm to one of his two sons who was born and raised thereon. Several years before, when he moved therefrom and his son and wife took possession, he told them he would give the son the place, with the understanding that he would remunerate his brother, to whom he

had already given some property, but not as much as the farm was worth. He said he would leave the live stock which was worth about thirteen hundred dollars on the place, and that his son might take possession of it, and pay him out of the proceeds thereof an amount each year to reimburse his brother, and the son paid two hundred and fifty dollars for a half interest therein. When the grantor left, he said that he and his wife were going to leave the son on the farm, that he wanted him to take good care of it, to improve it and to know that any improvements he made were his. Thereafter the grantor and his son treated the stock as if each owned a half interest equally, sharing the expenses, profits, and expenses of keeping and renewing the herd. The son paid the taxes on the stock but made no permanent improvements, and the grantor paid the taxes on the farm. The son intimated that his brother had been paid enough, and purchased his father's interest in the stock for four hundred and twenty-five dollars, and the deed was soon after made and recorded without his knowledge. Sometime before the conveyance, the grantor became insolvent and a bank in which he was interested had been for a considerable time kept in operation solely on his apparent responsibility as owner of the farm. The grantor must have known when he sold the stock that his bank was pressed. *Held*, that no gift of the farm was made until the deed was executed, and hence it was void as to creditors.

*Appeal from Keokuk District Court.*—HON. D. RYAN,  
Judge.

THURSDAY, MAY 25, 1899.

PLAINTIFFS are judgment creditors of the defendant Allen Stalker, and they bring this action in equity, seeking to subject to the payment of their claims a tract of land, the title to which is in Milo Stalker, another defendant. There was a decree in favor of defendant. Plaintiffs appeal.—*Reversed.*

*C. H. Mackey, Woodin & Son, D. T. Stockman, Hamilton & Donahoe* and *C. M. Brown* for appellants.

*C. A. Carpenter, W. R. Lewis* and *A. G. Schulte* for appellees.

WATERMAN, J.—Allen Stalker was, in 1889, a wealthy farmer of Keokuk county. He resided upon a farm of three hundred and twenty acres, valued at about fifteen thousand dollars, near Richland. Besides this farm, he owned other real estate, and was possessed of some eighteen thousand dollars in moneys and credits. Some years prior to the date mentioned, he engaged in the banking business in Richland, as a member of the firm of Charlton & Stalker, and he continued in this business until October, 1895, when he was overtaken by disaster which gave rise to this controversy. Stalker had two sons, Asberry and Milo. Upon Asberry's marriage, which occurred prior to 1889, the father gave him a farm of one hundred and forty acres and two hundred dollars in cash, and shortly afterwards one thousand dollars more in money, and in 1892 gave him another tract of eighty acres of land, which cost two thousand eight hundred dollars. In 1889 Milo married. Without going into details, it is enough to say that at the father's request Milo and his wife took possession and charge of the home farm, Allen Stalker and wife moving to Richland, where they continued to reside thereafter. On September 7, 1895, without the knowledge of the grantee, Allen Stalker and wife executed to their son Milo a deed for the three hundred and twenty-acre farm, and left the instrument with the county recorder to be entered of record. About the middle of the succeeding month the firm of Charlton & Stalker, which had long been insolvent, failed, the sheriff taking possession of all assets. After this Milo took the deed from the recorder's office. The deed purported to be made in consideration of "love and affection." It is claimed by defendants that this farm was given Milo at the time Allen Stalker moved to Richland, in 1889; that the gift was at once executed by giving Milo possession. There is evidence tending to show that at this time Allen Stalker intended giving this farm to Milo subject to certain payments which the latter was to make. The arrangement is thus described by Allen Stalker: "I told

him that I would give him the place. That Asberry hadn't had so much as he had, and that we would have to remunerate him, and do something more for him, if he had the whole place; and I wanted him to have it all. For a day or two we talked over plans and ways about the stock, so I got along to this plan: That I would just leave the stock on the place, and let him take possession of it, and that he might pay me an amount each year out of the proceeds of the stock that was sold to reimburse Asberry, and make him up,—that is, take off of the one and add to the other; and proposed that he give me the one-half, or, that is, he pay me what he could toward the stock that was on the place, and then, when anything was sold, just divide equal,—he might take half and pay me half,—and he accepted that. That he was to pay me a certain amount, and then as an interest in the stock that was on the place. We had the cattle and hogs and sheep. He was to pay me two hundred and fifty dollars, as I remember it. There was two hundred dollars of it, I know exactly, was to be paid. The other fifty dollars I can't remember how that was paid. I have it in my mind it was two hundred and fifty dollars he was to pay." This was the preliminary talk as to the claimed donor's intention. The gift was made or completed, as is now asserted, at the breakfast table on the day the old people moved. Allen Stalker tells of the matter in these words: "The morning my wife and I were going to move, as we were sitting at the breakfast table, I said to them: 'Now, Milo, we are going to move to town, and leave you here with the farm, and I want you to take good care of it, and try to do well by it, as I have tried to do, and improve it all you want to; and any improvements that you are a mind to put on it I want you to know that you are working for yourselves.' I also spoke of the arrangement that we had entered into, so that there might be nobody in the dark about it." The live stock mentioned was worth about one thousand three hundred dollars. Milo paid the two hundred and fifty dollars for a one-

half interest. After this, the stock was fed and marketed by Milo, and the gross receipts equally divided between him and his father. They paid in equal shares for all stock purchased to renew the herd. The total receipts from sales of stock up to August, 1895, were over eleven thousand dollars. About two thousand dollars of this was expended from time to time to purchase other stock. Asberry was given an additional sum of two thousand eight hundred dollars, in 1892, in the farm of which we have already spoken. In August, 1895, Milo told his father, in substance, that he thought he had paid enough to make matters even between him and Asberry. The father assenting, Milo purchased his interest in the stock on hand for four hundred and twenty-five dollars, and afterwards, as stated, the deed was executed. During the years from 1889 to 1895, inclusive, Allen Stalker paid the taxes on the farm, and Milo paid taxes on the stock. Milo made certain improvements upon the farm during this period, but they were inexpensive, and substantially all of such a character as were necessary for his immediate use. We cannot follow counsel through all the incidents of the case without unduly lengthening this opinion. We shall content ourselves with giving our conclusions. That Allen Stalker, when he left the farm in 1889, intended some time to give it to Milo, we have no doubt. That he then made a present gift of it, we do not believe. Neither is there any warrant for saying that the transaction was in part a gift and in part a sale. The amount Milo was to pay was never fixed, or even approximated. As a matter of fact, he paid nothing. He and his father were in partnership in the keeping and selling of live stock, and they divided the profits. That is all there is of it. Milo gave nothing out of his share. The father furnished the farm, and paid one-half the cost of the stock, and Milo did the work. Milo had much the best of this transaction. In August, 1895, when the father sold his interest in the cattle to Milo, he was well aware that the bank was in financial difficulty. He may not



have known its exact condition, but, even in the absence of direct evidence as to his knowledge, we should be unable to agree with his counsel, who assert that he was wholly ignorant of the business or its condition. He had been connected with this bank for many years, had taken a part in its management, and must have been to some extent familiar with the business. It is undisputed that in August, 1895, he knew the bank was pressed for money; that some of its paper had been dishonored. It cannot be other than true that the bank was kept in operation for a considerable time solely on Stalker's apparent responsibility, and this valuable farm was, so far as the public knew, a part of his assets. Milo's possession of the farm is hardly a factor in the case. He was born, and had always lived, upon it. Both parties offer in evidence oral admissions and declarations of Allen and Milo Stalker, some in support of, and others adverse to, the latter's title. We allow them but little weight. They are all of that character which it is said should be received with great caution,—random statements made in casual conversation. 1 Greenleaf Evidence, 200; *Allen v. Kirk*, 81 Iowa, 658; *Martin v. Town of Algona*, 40 Iowa, 392. So far as the acts and conducts of these parties after 1889 are concerned, nothing is shown that is inconsistent with the relation between them of landlord and tenant, and the fact that Allen Stalker continued during these years to pay the taxes on this farm is very significant in support of the existence of such relation. Our conclusion is that no gift of this land was made until the execution of the deed on September 7, 1895, that the claims of plaintiffs were in existence at the time, that the grantor was then insolvent, and the transfer is therefore invalid as against the indebtedness which is here asserted. The decree of the district court will be REVERSED.

## FRANK P. LAMB V. THE CITY OF CEDAR RAPIDS, Appellant.

108	629
112	233
108	629
114	628
108	629
122	589

**Negligence: STREETS.** The responsibility of a municipal corporation  
 1 for the condition of its streets extends to natural defects and  
 obstructions permitted to remain when the street is opened for  
 public use, it being assumed for the purpose of this case that such  
 8 responsibility does not attach where the defect is outside of so  
 much of the street as is customarily used by the public.

**NOTICE.** Where a city has sufficient notice of an alleged defect in a  
 2 street, it is liable for injuries caused thereby, where it fails, in the  
 exercise of reasonable care, to remove or remedy the defect.

**Instructions: DAMAGES.** In an action for personal injuries, an  
 instruction to allow plaintiff such an amount as "you believe from  
 5 the evidence he was justly entitled to," refers as well to future as  
 to past damages, it requires the jury to make such allowance for  
 future damages as it believed from the evidence plaintiff is entitled  
 to, and it is not erroneous for indefiniteness.

**SAME.** An instruction in an action to recover for negligent injuries  
 is not erroneous for failure to give any rule for estimating the  
 amount to be allowed for loss of future earnings, where it tells  
 5 the jury to consider the abilities of plaintiff to earn wages at the  
 time of the injury and also his ability to earn wages since the  
 injury, and "allow him such amount as you believe from the evi-  
 dence he is entitled to."

**PREPONDERANCE: Harmless error.** An instruction that by a pre-  
 ponderance of evidence was meant the greater weight and value  
 4 thereof, and not the greater number of witnesses, though mislead-  
 ing, could not be prejudicial to defendant, where the greater  
 number of witnesses testified for plaintiff.

**SAME.** An instruction to allow plaintiff the expense, "if any," for  
 7 nursing is not prejudicially erroneous, where there was no evi-  
 dence of such expense, as the jury were limited to expense shown.

**DEFINITENESS. Request.** I is not erroneous to instruct the jury in a  
 negligence action to allow as damages "such amount as you  
 6 believe from the evidence he is justly entitled to," and, in the  
 absence of a request for more definite instructions, such request is  
 sufficient.

*Appeal from Linn District Court.*—HON. WILLIAM G.  
 THOMPSON, Judge.

THURSDAY, MAY 25, 1899.

ACTION at law to recover on account of personal injuries alleged to have been caused by negligence on the part of the defendant. There was a trial by jury, and a verdict and judgment for the plaintiff. The defendant appeals.—*Affirmed.*

*Warren Harman, J. J. Powell, John N. Hughes, and Powell & Harman* for appellant.

*Chas. A. Clark & Son* for appellee.

ROBINSON, C. J.—In March, 1895, the plaintiff, while assisting in the loading of a piano onto a dray in a street of the defendant, fell upon the stump of a small tree, and received severe injuries. He alleges that the accident occurred at a place where there was business property on each side of the street, and that it was the duty of the defendant to keep the street at that point in a safe condition for the transaction of business, and free from dangerous defects and obstructions of every character which might interfere with the use of the street; that the stump referred to constituted a defect and an obstruction in the street, and a source of danger, for which the defendant was responsible. The answer pleads contributory negligence on the part of the plaintiff, and avers that the stump was not in a part of the street worked and used for public travel, but in a part allowed by the defendant to the owners of adjoining property for use as a street park.

I. The appellant first complains of a refusal of the court to give an instruction, a copy of which is as follows: "First. The testimony shows without contradiction that some years prior to the alleged injury the city council of the city of Cedar Rapids, defendant in this action, had passed an ordinance granting property owners in said city owning lots abutting or lying along streets eighty feet wide the right to use twenty feet of the street next to their property for the purpose of parks or grass plats, and such property owners

had the right to use that part of the street next to their lots for the purpose of beautifying the same in different ways, including the right to plant shade trees and make grass plats. It also appears that Third street west was eighty feet wide at the place of the alleged injury. Therefore the property owners on each side of the street where the alleged injury happened were entitled to occupy so much of the street as abutted on their respective lots; such occupation being limited to twenty feet from the lot line, leaving forty feet in the central portion of the street for vehicles and teams, and being further limited to the uses set forth in the ordinance which has been introduced in evidence. If you find that up to the time of the alleged injury the city authorities had never worked or improved the west twenty feet of Third street west between Eighth and Ninth avenues, but left that part of the street in its natural condition, then you will find for the defendant, unless you find that the city authorities had failed to provide a reasonably safe roadway of sufficient width to accommodate the public travel on that part of the street." The first part of the instruction is sustained by the evidence, and the last part refers to the place of the accident, and the jury would have been authorized to find that the stump was within the part of the street which the defendant had authorized the owner of the adjoining property to use for the purpose of a street park, and which the defendant had not improved, and that a reasonably safe roadway of sufficient width had been provided in the street, but outside the space the use of which for a park had been authorized. Some of the evidence tended to show that the street had never been parked nor curbed at the place of the accident, although there was a shallow gutter at some distance from the lot line and sidewalk at about the place where the outer line of the parking, had it been constructed, would have been; that hitching posts had been placed within that line and near the sidewalk; that a small business house was

located on an adjoining lot; and that the street at the place of the accident was traveled and used for all the ordinary purposes of a street. It may be conceded, for the purposes of this case, that the duty of the defendant to keep its streets in reasonably good condition, free from defects and obstructions dangerous to the public, extends only to so much of each street as is customarily used by the public. See *Stafford v. City of Oskaloosa*, 57 Iowa, 748; *Fulliam v. City of Muscatine*, 70 Iowa, 436, 9 Am. & Eng. Enc. Law, 385; *Tiedeman Municipal Corporations*, section 346. But it is not true that a municipal corporation is not liable for the defects and obstructions in a street left in its natural condition which has been opened to public use. The corporation may be under as great obligation to remedy a defect or to remove an obstacle in one case as in the other. Hence, as the jury might have found from the evidence submitted that the portion of the street in question had been opened to public travel, and that it was the duty of the defendant to keep it in a reasonably safe condition, the district court properly refused to give the instruction we have set out. The court charged the jury that if the defendant, having had sufficient notice of the alleged defect, in the exercise of reasonable care ought to have removed or remedied it, then the defendant did not discharge the duty which the law imposed upon it, and, as applied to the evidence, we think that was correct. See *Stafford v. City of Oskaloosa*, 64 Iowa, 251; *Foshay v. Town of Glen Haven*, 25 Wis. 288; *North Manheim Tp. v. Arnold*, 119 Pa. St. 381 (13 Atl. Rep. 444); 2 *Dillon Municipal Corporations*, section 1008; *Elliott, Roads & Streets*, 447. Much of what we have said applies to the second and third instructions asked by the defendant and refused by the court. We do not think the court erred in not giving either of them. Some of the instructions asked by the defendant and refused were based in part upon the theory that the owner of the lot in

front of which the accident occurred was using that portion of the street as a park. Our attention has not been  
3 called to any evidence which tends to show that such use of any part of the street was being made at that time, while the fact appears to have been that it was used for the ordinary purposes of a street. If it was so used, it was the duty of the defendant to keep it in reasonably safe condition for that purpose.

II. The appellant complains of a portion of the third paragraph of the charge given, on the ground that the court usurped the functions of the jury, and decided that the stump in question was a defect for which the defendant was liable, if it had sufficient notice to have removed it before the accident occurred; but an examination of the entire paragraph shows that the complaint is not well founded. Whether the stump constituted a defect which the defendant ought to have removed was submitted to the jury to decide.

III. The court charged the jury that "by a preponderance of the evidence is meant the greater weight and value of the evidence, and not the greater number of witnesses." That statement is in a sense correct, but is not to be commended, for the reason that in some cases it might be misleading, or at least confusing. A preponderance of  
4 the evidence may or may not be given by the greater number of witnesses. But prejudice to the defendant could not have resulted in this case, for the reason that the greater number of witnesses testified for the plaintiff.

IV. The seventh paragraph of the charge to the jury was as follows: "In making up your verdict, if you find for the plaintiff, you will consider the ability of the plaintiff to earn wages and perform labor prior to the time of the alleged injury, as shown by the evidence, and also his ability to earn wages and perform labor since receiving the alleged injury, the time he lost, if any, because of said injury, the expenses, if any, for medical treatment and nursing, and the physical pain and mental anguish, if any, you find he has

suffered on account of the injury, and allow plaintiff such amount as you believe from the evidence he is justly entitled to; but, in arriving at the amount, if any, you allow for loss of future earnings, you will take into consideration the fact that such amount, if any, will be paid in a lump sum, and you will only allow for the present worth or value of the same." The defendant complains of that paragraph

5       on two grounds, the first of which is that it does not give any rule for estimating the amount to be allowed for loss of future earnings. We said in *Fry v. Railroad Co.*, 45 Iowa, 416, of an instruction which directed the jury to allow the plaintiff in that case "such damages as will fairly compensate her for all past, present, or future physical suffering or anguish, which is, has been, or may be caused by said injury" that it was too broad, and permitted the jury to enter the domain of conjecture, and indulge in speculation to a greater extent than was allowable; that the jury should have been directed that it could look alone to the evidence, and determine therefrom what damage it was reasonably certain the plaintiff would sustain in the future; and that an allowance could not be made for damage which might but was not reasonably certain to ensue. In the case of *Kendall v. City of Albia*, 73 Iowa, 241, it appeared that the court had charged the jury that if the plaintiff in that case, as a result of an accident there in question, had "by reason of said accident suffered bodily pain and mental anguish to the present, and will so suffer in the future, then for such pain and anguish, past, present, and future, you should allow him such sum as you think proper, under the evidence, without proof of any special sum." That was modified, however, by the following: "With reference to future damages, you should be satisfied from the evidence that they will probably be sustained by the plaintiff." And we held that the two instructions, construed together, were correct. In *Ford v. City of Des Moines*, 106 Iowa, 94, we considered the part of a charge which authorized a recovery for the impairment

of power to enjoy life by reason of an injury, "and for such pain and inconvenience and impairment of enjoyment for such time as the same has been or may continue, as shown by the evidence in the future, if any," and held it to be erroneous for the reason that it authorized the jury to allow for that which was merely possible, not for what the evidence showed was reasonably certain to continue. The

6 charge under consideration is not quite so definite and certain as were the two considered in the case of *Kendall v. City of Albia, supra*; but it is not correct to say that no rule whatever for ascertaining future damages was given. The direction to allow plaintiff "such amount as you believe from the evidence he is justly entitled to" referred as well to future as to past damages, and required the jury to make such an allowance for future damages as it believed from the evidence he should have. The jury must so have understood the paragraph, and, in the absence of a request for a more definite instruction, it was sufficient. It

7 is further insisted that the paragraph was erroneous in directing the jury to "consider \* \* \* the expenses, if any, for nursing," for the reason that the evidence did not show that the plaintiff incurred any expense for nursing, nor that the services rendered were of any value. The only evidence in regard to nursing was given by a witness who stated that he helped take care of the defendant, and helped to dress his wound. It is not shown how much the witness did, nor that any compensation for his services had been made or was expected, and the evidence would not have authorized an allowance for nursing. In *Reed v. Railroad Co.*, 57 Iowa, 23, the district court directed the jury, in case it found for the plaintiff, to allow for "expenses reasonably incurred for medical care and attention," and we held it reversible error for the reason that there was no evidence upon which an estimate for such an allowance could have been based. In the case of *Stafford v. City of Oska-loosa*, 57 Iowa, 748, we held that an instruction which



directed the jury, in estimating damages, to consider the expenses incurred by the plaintiff for his treatment by surgeons and physicians was erroneous for the reason that there was no evidence which tended to show what expenses, if any, the plaintiff had incurred for that purpose. Whether the error was sufficient to have authorized a reversal on that ground alone was not stated. The portion of the charge in this case under consideration did not peremptorily direct the jury to allow for expenses incurred in nursing, in case it found for the plaintiff, as was done in regard to the expenses in question in the *Reed Case*, but merely instructed the jury to consider the expense, if any, incurred for nursing. In that respect it differed from the instructions held to be erroneous in both the cases cited. We think it was erroneous in referring to expenses for nursing, but that in consequence of the limited words "if any," and the character of the testimony respecting such expenses, the error could not have been prejudicial.

V. The appellant urges numerous objections to instructions refused, and to portions of the charge given, to which we have not referred specifically. It is sufficient to say that some of the objections urged are disposed of by what we have already said, and others are not of sufficient importance to receive separate mention. Whether the plaintiff was negligent was a question properly submitted to the jury. It may be that he should be charged with knowledge of the stump before he was hurt, as he had worked near it for some minutes before the accident occurred; but the evidence tends to show that the piano had been loaded upon a dray, and that in order to change the position of the piano it was moved towards the rear end of the dray. The plaintiff was at that end, pulling on the piano, and another man was at the other end, pushing. The piano moved more easily than the plaintiff had anticipated, he lost his hold, and fell backward onto the stump. We cannot say that the jury was not authorized to find the plaintiff free from negligence, in view of all the

facts in the case. We do not think the verdict was contrary to the charge of the court, nor that it lacks support in the evidence. The judgment of the district court is **AFFIRMED**.

**HARRIET J. STEPHENSON v. BANKERS LIFE ASSOCIATION,**  
of Des Moines, Iowa, Appellant.

**Suicide: PRESUMPTIONS: Evidence.** The presumption is that a killing  
1 was accidental, and not suicidal, where the evidence is circum-  
stantial and compatible with either theory.

**SAME.** In an action on an insurance policy, where the defense was  
suicide, the evidence disclosed that defendant was found dead in  
a barn on his own premises; that he had, with the consent of the  
physician in charge, just returned home from an insane asylum,  
in company with his brother-in-law; that on his way home he  
procured a revolver, with the avowed purpose of shooting the  
1 sheriff if he attempted to return him to the asylum; that on his  
arrival at home he seemed glad to meet his family; that he  
picked up and kissed his babe; that when he reached his home he  
and his brother-in-law started to go into the house, the latter sup-  
posing deceased was following him, and just as he arrived at the  
2 door, a pistol-shot was heard in the barn; that the deceased was  
found lying on his back with his right hand grasping the revolver  
drawn up over his breast, and his left arm extended along his  
3 left side, with a bullet hole in the center of his forehead; that there  
was no laceration, and but slight, if any, powder marks about the  
wound; that the revolver was probably not held close to the head;  
and that, if the body had been raised it would face the left side of  
the barn, about eighteen inches from the door by which he had  
entered; and that he at no time threatened to commit suicide.  
*Held*, that such evidence did not overcome the presumption that  
death was accidental.

**Proof of Loss: SUFFICIENCY.** An affidavit of the undertaker who  
buried insured, which sets forth that he buried insured, and that  
7 insured died on a certain day, to his positive knowledge, is not  
such proof of death as is contemplated by Acts Eighteenth General  
General Assembly, chapter 211, section 8, which provides that the  
8 beneficiary shall, within sixty days after death notify the com-  
pany of the death of the insured, which notice shall be accompa-  
9 nied by an affidavit of the beneficiary stating, so far as lies within  
his knowledge, the facts and circumstances under which the death  
of the insured occurred.

108	637
109	524
108	637
127	30

108	637
1132	71
1132	560

108	637
134	580

108	637
1130	448

108	637
143	550
143	552

**Pleading: WAIVER. Proof of loss.** It is not necessary to state that  
5 facts are pleaded for the purpose of showing a waiver or estoppel,  
as, if they are sufficient, they will be given that effect.

**SAME.** A plaintiff may, in an action on an insurance policy, plead  
12 both a waiver of proof of death by defendant and the giving of  
proof by plaintiff.

**EVIDENCE OF WAIVER.** The beneficiary in an insurance policy notified  
the insurance company in writing of the death of insured, and in-  
quired of the company whether it had received proofs of death, and,  
if so, requested the company to send suitable blanks. The company  
stated in answer that it had previously written to one B. concern-  
ing the death of insured, and inclosed a copy of the letter. The  
company denied all liability, on the ground that the insured had  
taken his own life, and refused to furnish blanks, lest by doing so  
it might be held to have admitted the claim. The bene-  
ficiary sent the company what purported to be proofs of death,  
and stated that, if further proofs were required, they would be  
furnished on application. The company retained such proofs  
4 without objection and never asked for further proof. The com-  
6 pany also wrote the beneficiary that they had examined into the  
8 matter, and learned beyond any doubt that insured had taken his  
10 own life, and that they were not liable. *Held*, that the company  
had waived proof of death.

**Surrender of Policy: CONDITION PRECEDENT.** In an action on a  
policy which provides that the insurance shall be paid on pre-  
11 sentation of the policy, with satisfactory proof of death, it is not  
necessary to show a tender of the policy before the commence-  
ment of the suit.

*Appeal from Kossuth District Court.*—HON. LOT THOMAS,  
Judge.

THURSDAY, MAY 25, 1899.

**ACTION** at law upon a certificate of membership in the  
defendant association. Defendant pleaded that the assured,  
Louis E. Stephenson, committed suicide, and further claimed  
that no sufficient proofs of death were furnished within the  
time required by law and the terms of the certificate. There-  
was a trial to a jury, resulting in a verdict and judgment for  
plaintiff, and defendant appeals.—*Affirmed*.

*Ayres, Woodin & Ayres, and Geo. E. Clark* for appel-  
lant.

*E. V. Swetting and A. E. Morling* for appellee.

DEEMER, J.—December 26, 1895, the defendant issued a certificate of membership to Louis E. Stephenson, by the terms of which it agreed to pay plaintiff, his beneficiary, two thousand dollars, in the event of the death of the assured during the life of the certificate. One of the conditions on which it was issued was that the certificate should be null and void if death occurred from self-destruction within two years from its date, whether the member was sane or insane at the time he took his own life. On the twenty-second day of September, 1896, the deceased was found dead in a barn upon his own premises. The evidence tends to show

1       that he had been in an insane asylum for some time just prior to his death. His brother-in-law went after him, and, with the consent of the physician in charge, brought him home from that institution. When he returned, he seemed to be better than when he was taken to the asylum. Shortly after his arrival at home he procured a revolver which had been left at the house of his brother-in-law, with the avowed purpose of preventing the sheriff from returning him to the asylum; declaring that he would shoot that officer if he should undertake to return him to the hospital. When he reached home he seemed very glad to meet his family, and displayed considerable interest in his home and surroundings. He picked up his little babe, kissed it, and seemed to have the usual parental affection for his offspring. After procuring the revolver he started for home, accompanied by his brother-in-law, who attempted, without avail, to secure the revolver; and, having reached home, both parties started to go into the house. The brother-in-law went around to the front door to tell the wife of the assured that he had a revolver, supposing that the assured was following him. Just as the brother-in-law arrived at the door and had communicated the fact of the assured's having a revolver, a pistol shot was heard in the direction of the barn, which was but a short distance from the house. Shortly thereafter

various parties went to the barn, and there found the assured. He was lying on his back, his body extended. His right hand, which grasped the revolver, was "kind of drawn up over his breast," and his left hand and arm were extended along his left side. A bullet wound was found near the center of the forehead, the ball ranging upward. There were very slight powder marks, if any, about the wound, and there was no laceration. It was a clear cut. If the body had been raised to its feet from the recumbent position in which it was found, it would face the left-hand side of the barn, about eighteen inches or two feet from the door by which it had entered. The bullet wound was fatal. The doctor who examined the deceased shortly after his death testified that there were no powder marks, and that the discoloration of the wound looked as if it might have been made by the smoke or dirt off of the bullet, rather than by the smoke from the gun; and he further testified that the revolver was not held close against the head. This was practically all the evidence relating to the manner and cause of death.

On the one hand it is contended that this evidence clearly shows self-destruction, while on the other hand it is said that the evidence points to the theory of accident. The

trial court instructed to the effect that the presumption was that the killing was accidental, and that the burden was on the defendant to show that the assured committed suicide. While some complaints are lodged against the instructions, they are largely hypercritical and without substantial merit. They announce the law as established by almost the entire current of authority, and are clear, comprehensive, and easily understood. See *Inghram v. National Union*, 103 Iowa, 395; *Hale v. Investment Co.*, 61 Minn. 516 (63 N. W. Rep. 1108); *Insurance Co. v. Nitterhouse*, 11 Ind. App. 155 (38 N. E. Rep. 1110); *Beckett v. Association*, 67 Minn. 298 (69 N. W. Rep. 923); *Jones v. Association*, 92 Iowa, 652; *Follis v. Association*, 94 Iowa, 439; *Insurance*

*Co. v. McConkey*, 127 U. S. 661 (8 Sup. Ct. Rep. 1360). Again, it is contended that the evidence shows without dispute that the deceased committed suicide. As we have already observed, there is a presumption in favor of the theory of accident. This presumption has the effect of affirmative evidence, and, unless so negated by the surrounding facts and circumstances as to leave room for no other reasonable hypothesis than that of suicide, such presumption will be allowed to prevail, and a verdict founded thereon will not be set aside for want of evidence. Some facts are disclosed by the record in aid of this presumption. It is evident that the revolver was not held against the head, as is usual in cases of suicide. The position of the body and the direction of the wound also give color to the claim of accident. Again, there is no evidence tending to show a desire or purpose on the part of the deceased to take his own life. Indeed, he seemed to be so in love with his home and family as to threaten the life of the one who he feared might remove him from them. He seemed to be on affectionate terms with all the members of his family, and at no time threatened to take his own life. While some of the circumstances point  
3      towards self-destruction, yet we cannot say that the evidence is sufficient to overcome the presumption of accident. The most that can be said is that they point as strongly in one direction as the other; but this, as we have seen, is not sufficient, for the reason that plaintiff's case is aided by a presumption based upon the love of life found in every individual, which is ordinarily sufficient to induce its preservation.

II. Plaintiff alleged in her petition that she made proof of death, and served the same upon defendant, "a copy of which proof is hereto attached, and made a part hereof, marked 'Exhibit B.' " She also pleaded a waiver of proofs of death, based upon certain correspondence, which will be hereafter referred to. Defendant admitted the receipt of Exhibit

B, but denied all other allegations relating to proofs of loss.

As the question to be decided involves a consideration  
4 of all the correspondence between the parties, it is  
perhaps better to refer to the waiver pleaded by plaintiff. It is alleged in the petition that defendant refused, and still refuses, to pay the amount of the certificate, on the ground that the assured took his own life. In an amendment to the petition, plaintiff alleges that on October 8, 1896, she, through her attorney, notified the defendant, in writing, of the death of the assured, inquired of defendant whether it had received proofs of death, and, if not, whether it desired such proofs, and requested defendant to send blanks, that proofs might be made; that in reply thereto defendant informed plaintiff that it had written one E. G. Bowyer in regard to the death of the assured, and inclosed a copy of the letter written him, in which it denied all liability and refused to furnish blanks; that thereafter plaintiff, through her attorney, again wrote defendant, asking whether it refused to pay the certificate, which defendant never answered; that thereafter, and on October 26, 1896, plaintiff sent the proofs of loss referred to in her petition, and stated that, if further proofs were required, they would be furnished on application; that this letter was never answered; and that defendant received, and still retains, the proofs of death, and has never made any objection thereto, but refused,  
and has ever since refused, to pay the loss. It is

5 true that this amendment does not state that these facts were pleaded to show a waiver or estoppel; but such is undoubtedly their legal effect, and plaintiff was not required to name her plea. If the facts stated amounted to a waiver, they are sufficient, although not christened. To sustain these allegations with reference to proofs of death, plaintiff introduced the following correspondence:

"Algonia, Iowa, Sept. 22, 1896. Bankers' Life Association, Des Moines, Iowa: I am requested to inform you

of the death of Louis E. Stephenson by gunshot wound, which happened this a. m., as he holds policy No. 6 49,417 in your company. Yours, truly, E. G. Bowyer."

"Algona, Iowa, Sept. 29, '97. Bankers' Life: I wrote you a few days ago of the death of L. E. Stephenson, policy No. 49,417, which, as yet, I have not heard from. Will you please let me hear from you on receipt of this, and oblige? Yours, truly, E. G. Bowyer.

"P. S. Please send blanks, etc."

Attached to the bottom of said exhibit is the following:

"Dear Sir: In reply to your letter of the 29th ult. in regard to the death of Louis E. Stephenson, we have to say that we are informed that he took his own life. If this is the fact, the association did not agree to pay anything to his beneficiary, and is not liable under the terms of the certificate. We do not, therefore, send blanks for proof of his death, lest it might be held that by so doing we had admitted the validity of the claim. If Mr. Stephenson is willing to surrender the certificate upon return to her of the notes given and of the money paid by Mrs. S., she may write us to that effect, and we presume that the board of directors would be willing to arrange the matter in that way."

"Algona, Iowa, Oct. 8, 1896. Bankers' Life Association, Des Moines, Iowa—Gentlemen: Are you aware that L. E. Stephenson, holding policy No. 49,417 in your association, is dead? Have you received proofs of his death? If you have not, and desire such proofs, will you kindly send me blanks, that the proofs may be made? Awaiting an early answer, I am, yours, truly, E. V. Swetting, per M. J."

On the bottom of said exhibit is the following:

"Dear Sir: In response to your inquiry of yesterday we have to say that we wrote Mr. E. G. Bowyer in regard to the death of Louis E. Stephenson under date of October 3d, and we inclose herewith copy of our letter to him."



"Des Moines, Iowa, Oct. 9th, 1896. E. V. Swetting, Algona, Iowa—Dear Sir: In response to your inquiry of yesterday, we have to say that we wrote Mr. E. G. Bowyer in regard to the death of Louis E. Stephenson under date of October 3d, and inclose herewith a copy of our letter to him. Yours, truly, The Bankers' Life Association, by Clark."

A copy of the first letter to Bowyer was inclosed, as stated.

"Algona, Ia., Oct. 12, 1896. Bankers' Life Association, Des Moines, Iowa—Gentlemen: I have yours of the 9th, inclosing copy of letter heretofore sent to E. G. Bowyer with reference to Louis E. Stephenson. I am not advised that the statement, or, more properly speaking, conclusion you draw, in the letter to Bowyer, is correct. Do I understand from the letter that your company refuses to pay the policy or certificate which Louis E. Stephenson held at the time of his death? An early reply will very much oblige. Yours, truly, E. V. Swetting."

"Algona, Iowa, Oct. 26, 1896. Bankers' Life Association, Des Moines, Iowa—Gentlemen: I inclose you herewith proof of death of L. E. Stephenson, of Algona, Iowa, who held certificate No. 49,417 in your association. If you desire further proofs as to his death, please advise me, and they will be furnished. Yours, very truly, E. V. Swetting."

"State of Iowa, Kossuth County—ss.: I, J. R. Laird, being first duly sworn, on oath say that I am a resident of Algona, Kossuth county, Iowa, and have been for the  
7 last ten years; that I am in the furniture and undertaking business; that I was the undertaker who acted at L. E. Stephenson's funeral; that I buried the said L. E. Stephenson in the cemetery at Algona, Kossuth county, Iowa, on the 24th day of September, A. D. 1896; that the said L. E. Stephenson died September 22, A. D. 1896, to my positive knowledge. J. R. Laird.

"Subscribed and sworn to before me by the said J. R. Laird this 26th day of October, A. D. 1896. Ernest V. Swetting, Notary Public."

"Mrs. Harriett Stephenson, Algona, Iowa: Your letter dated November 12th came this morning. We made an investigation as to the death of Louis E. Stephenson, and learned beyond any question that he took his own  
8 life. The contract provides that the certificate shall be null and void under such circumstances. We did not agree to pay anything if he took his own life, and, of course, cannot be expected to do so. We sent to the bank, to be delivered to you, the money he paid and the notes he gave. You can get it by going there for it. [Signed by defendant.]"

Some of these exhibits were objected to when offered, but the court reserved its ruling, and at no time indicated what his holding would be save as it may be gathered from his conclusion that proofs were either given or waived, for he refused to submit the question of the giving of proofs of death to the jury. As there were no rulings made on defendant's objections, there is nothing to consider, save the correctness of the ultimate conclusion arrived at.

Does this correspondence show that proofs of death were given as required by the statute then in force? Acts Eighteenth General Assembly, chapter 211, section 3. We are  
9 constrained to hold that it does not. The affidavit was not made by the beneficiary, nor does it show how the death of the assured occurred; and under our holding in *Brock v. Insurance Co.*, 96 Iowa, 39, and *Welsh v. Insurance Co.*, 71 Iowa, 338, it must be held insufficient.

The certificate of membership provides that the amount is to be paid upon presentation of the certificate, with satisfactory proof of claim, to be supplied by the beneficiary. If it be conceded that this is the only condition to be com-

plied with by the assured (a matter which we do not decide), yet the proofs do not meet this requirement.

Do the facts show a waiver of proofs of death? It is a principle of almost universal application that the law does not require the doing of vain things. Consequently it is held that a denial of liability on other grounds than failure to furnish proofs of loss is a waiver of the right to insist upon them. *Bloom v. Insurance Co.*, 94 Iowa, 363; *Parsons v. Grand Lodge*, 108 Iowa, 6. Now, the evidence shows beyond all question that defendant denied liability under the policy, and refused to furnish blanks upon which to make formal proofs of death. This was equivalent to saying that it would not receive proofs, even if made in proper form, for fear it might waive its defense. Defendant contends that it did not make an unqualified denial of liability in its first letter, and that plaintiff was in duty bound to comply with the law and the terms of the certificate, notwithstanding its intimation that it would not pay in a certain event. It further contends that the last letter was written more than sixty days after the death of the assured. This last contention is based upon a misapprehension of the facts. While the letter does not appear to be dated, it was certainly written before the fifteenth day of November, 1896. Plaintiff lived in Algona, and her letter to which the one now under consideration was an answer was written on November 12, 1896. It was answered on the day it was received, which, according to the usual course of events, would not be later than the 15th of that month. The assured died on the twenty-second day of September. This last letter is an absolute and unqualified refusal to pay, and constitutes a waiver of proofs. Again, defendant made no further response to the request to furnish blanks than what appears in the letters heretofore set out. It made no objection to the proofs as furnished, but, on the contrary, retained them in its possession until produced at the trial. These facts also show a waiver. *Grattan v. Insurance Co.*, 80 N.

Y. 281; *Dyer v. Insurance Co.*, 103 Iowa, 524; *Green v. Insurance Co.*, 84 Iowa, 135; *Young v. Insurance Co.*, 45 Iowa, 378. The trial court correctly held that there was a waiver of proofs of death.

Defendant further insists that, as plaintiff did not tender her certificate as provided by the terms of that instrument, she cannot maintain this action. We do not regard such tender a condition precedent to the right  
11 to bring suit. The certificate itself does not fix the time when it shall be surrendered, and, in the absence of some requirement that it shall be tendered before suit brought, it is sufficient to offer it at the trial. Certificates of deposit are almost always made payable upon presentation of the instrument, and yet it has never been held that presentment was a condition precedent to the right to maintain an action. Indeed, the rule is to the contrary. *Beardsley v. Webber*, 104 Mich. 88 (62 N. W. Rep. 173). The law does not require the surrender of a certificate of membership in a mutual benefit association before a right of action exists. The statute to which we have referred clearly negatives any such idea. *Vore v. Insurance Co.*, 76 Iowa, 548, relied upon by defendant, is not in conflict with anything  
12 that has been said in this opinion. It is entirely proper for plaintiff in an action of this kind, to plead the giving of proofs of death, and also a waiver thereof on the part of the defendant. *Warshawky v. Insurance Co.*, 98 Iowa, 221. Defendant's claim that no waiver is pleaded is fully answered by what we have already said. No prejudicial error appears, and the judgment is AFFIRMED.

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CHRISTIAN CHURCH OF TAMA, IOWA, v. E. S. CARPENTER,  
NATHAN HALL and HENRY SWARTZLANDER, Appellants.

**Departure from Creed: TEST OF MEMBERSHIP: Evidence.** A new pastor of a church taught new doctrines, and a well known leader of the faction professing them called on all who were willing to

accept the innovations to take the front seat; this being done expressly to settle misunderstandings as to belief. Shortly thereafter, three leading members who refused to tolerate the new doctrines were notified to be at church and confess, or they would be expelled, and on their failing to do so, the elders dropped their names. No specific charges were given, though demanded; the pretext for the members' dismissal being that they were walking disorderly. *Held*, to show that the new doctrines were made the test of membership, though no formal resolutions were adopted.

**Religious Corporations: TRUSTS: *Injunctions.*** The property of a church must be held and used in trust for the promulgation of the generally accepted doctrines of that church, and members departing therefrom and causing a schism therein, will be enjoined from controlling or interfering with its management

**RULE APPLIED.** A faction in a church discarded an organ used in the service, discontinued the Sunday school, denouncing certain pamphlets used therein, rejected the practice of receiving aid from outside and taking up collections, adopted the method of voluntary offerings and proclaimed the rule of the elders in place of self-government. The new doctrines were made the test of membership. The former practices of the church were not contrary to anything in the new testament, which was the creed of the church and were in accordance with the practices of the church generally. *Held*, that the new doctrines and practices were a substantial departure from the doctrines of the church, and their enforcement would be enjoined.

*Appeal from Tama District Court.*—HON. OBED CASWELL, Judge.

THURSDAY, MAY 25, 1899.

A CHRISTIAN Church was organized in Tama, in 1884, was incorporated in 1887, and acquired the church building in controversy. The defendants were enjoined from controlling the church, or from interfering with its use, by the trustees bringing the action and their associates, and appeal.—*Affirmed.*

*Caldwell & Walters* for appellants.

*Mills & Stinson* and *Willett & Huber* for appellee.

LADD, J.—Many of the matters argued by appellants require no attention, as we find they caused a schism in the

church, and insisted on the belief in doctrines differing substantially from those of the Church of Christ as a test of fellowship. Up to 1892, when their pastor, Cordner, died, the generally accepted doctrines of that denomination were taught; the Sunday school, in which were used the International Sunday School Leaves, prepared for the purpose of elucidating the Scriptures, flourished; an organ was played in the praise service; financial help was received from the Ladies' Aid Society; baskets were passed by the elders in taking up collections; the sacrament was administered after services; and the church had self-government. All

1      this conformed with the practices of the Christian Church. Its creed is the New Testament. Our attention has not been called to anything therein inconsistent with the doings of this people. Nevertheless, with the advent of a new pastor all was changed. The International Sunday School Leaves and the organ were privately denounced as instruments of the devil. The Sunday school was abandoned, as not authorized by the Scriptures, though the youth were sometimes taught from the Bible. The organ was relegated to the wood house; and, notwithstanding David's words, "Praise Him with stringed instruments and organs" (150th Psalm), and the vision of the beloved disciple who "heard the voice of harpers harping on their harps" from the redeemed about the throne, the use of any musical instrument in the church, save the human throat, was declared not to be sanctioned by the Scriptures. Receiving contributions from outsiders was condemned, and voluntary offering made only by depositing the gifts on a stand before the altar. The rule of the elders was proclaimed. Disbelief in the use of the organ, in the Sunday school, the rule of the elders, and the methods of giving were made tests of fealty. True, no formal resolution was adopted. But such were the teachings of pastors employed, and insisted on by the leaders of this faction. Thus in December, 1894, E. S. Carpenter, called upon all who were willing to take the New

Testament as the guide of faith, cast aside all things not named therein, and abide by the rule of the elders, to so signify by taking the front seats. This was for the express purpose of settling misunderstandings as to belief, and his interpretation was well known to be in accord with the new teachings. Besides, this was brought out by failing to answer pertinent questions. Shortly afterwards three leaders of those who refused to tolerate the innovations were notified to be at church the next Sunday, and confess, or they would be expelled. Specific charges were demanded, but never made. Failing to attend, the elders, in absence of objection from the congregation, dropped their names from membership. The pretext for this was that they were walking disorderly, but wherein we have been unable to ascertain, except in that they rejected these teachings. But see *Helbig v. Rosenberg*, 86 Iowa, 159. Thus the testimony of the witnesses, to the effect that the doctrines of the appellants and their associates were made the test of fellowship, finds strong confirmation in their acts, and, we think, is fully established by the evidence, notwithstanding their denial. The main difficulty lies in fixing upon the doctrines of the Christian Church. These are based upon the true interpretation of the New Testament. But both parties rest on theirs as being that which should guide the "Disciples," as members of this church are often called. The evidence is without dispute, however, that the practices of the church prior to the death of Cordner were in accord with those of the church generally, and nothing in the Scriptures

2      has been pointed out condemning them. The departures of the appellants and their associates may not seem of grave importance, but they were made the test of fellowship, and this it is evident must be regarded as substantial. The law applicable to such a case is not questioned. *Church v. Whitmore*, 83 Iowa, 138. The property must be kept in sacred trust for the promulgation of the doctrines of the New Testament according to the generally accepted interpretation of the Church of Christ.—*Affirmed*.

VALLEY NATIONAL BANK v. W. B. CROSBY et al., Defendants,  
CHAS. H. MARTIN, Administrator, and J. T.  
TIERNEY as Guardian of Minor Heirs,  
Appellants.

108	651
118	355
108	651
115	650
108	651
124	596
108	651
134	170
134	171
134	172
134	684

**Executors and Administrators: POWERS TO BIND ESTATE.** An administrator cannot bind his estate by contract, except pursuant to statutory authority.

**SAME.** Even if the authority of an administrator over real estate conferred by Code 1878, sections 2402, 2403, 2404, authorizes borrowing money for its benefit, that can be done only on due notice of those interested in the estate.

**RULE APPLIED.** Under Code 1878, section 2402, authorizing an administrator, the heirs being absent or incompetent, to take possession of realty, and receive rents, and do all other acts relating thereto, which may benefit the heirs, he cannot bind the estate for money borrowed for repairs, but not needed nor used by the estate, on order of the court, without notice to the heirs; and such action is not validated by an *ex parte* order of the court, authorizing him to execute notes therefor in his capacity as administrator.

GRANGER, J., dissenting.

*Appeal from Polk District Court.*—HON. C. P. HOLMES,  
Judge.

FRIDAY, MAY 26, 1899.

PROCEEDINGS in probate to establish a claim against the estate of Thomas Roche, deceased. The district court made a finding of facts, from which it appears that W. B. Crosby was appointed administrator of the estate of Thomas Roche, deceased, December 7, 1891, and qualified, but gave no notice of his appointment. The heirs of the deceased were minors, living in Texas, and the administrator took possession of the real estate, collected rents, and cared for it. On the day of his appointment he applied to a judge for an order to borrow money with which to pay certain interest and taxes.



No notice was given, and an order was entered as prayed, authorizing him "to execute to the party or parties loaning said money his note, signed by him as administrator of said estate, and to bind the estate for the payment of the same until such time as he shall have in his hands sufficient moneys from the rents and profits of said estate to liquidate said note, interest and commissions, if any." He thereupon borrowed six hundred dollars from the Valley National Bank, and executed his note therefor in accordance with the order. At that time he had in his hands seven hundred and fifty dollars and fifty cents belonging to the estate, out of which, with the rents collected, he might have paid the interest and taxes for which money was borrowed. Rents were collected, and charges against the property met therefrom. April 7, 1892, on a showing that the buildings had been injured by a storm, another order was entered, permitting the administrator to borrow money with which to make repairs, and he again did so from the same claimant, executing a note for one thousand dollars as before. He then had on hand one hundred and seventy-eight dollars and thirty-five cents, exclusive of the first loan. The rentals were over three hundred dollars per month, and there was no occasion for borrowing. In April, 1892, he paid out three hundred and sixty-one dollars and seventy-nine cents, and received one hundred and fifteen dollars, leaving a balance of sixty-eight dollars and forty-four cents in his favor,—the first and only time during his administration. This was replaced the following month from rents collected, and from then on to his resignation, in March, 1895, there was always a large balance, exclusive of borrowed money, in his hands. These notes were renewed from time to time until February 3, 1894, when four hundred dollars was paid, and that in suit for one thousand eight hundred dollars given in pursuance of another order of one of the judges of Polk county, but whether upon any application does not appear. At that time there was in Crosby's hands a balance of two

thousand four hundred and seventy-nine dollars and ninety-four cents, exclusive of borrowed money and any compensation due him. He made no report prior to August 17, 1894, and on his report, after allowing him compensation, he appeared to be indebted to the estate, not including the money borrowed, one thousand eight hundred and seventy-one dollars and twenty-four cents, which amount remains unpaid. All moneys received by him were kept in a common fund deposited in bank to his individual credit. Upon his resignation, Charles H. Martin was appointed administrator, and J. F. Tierney is guardian of the heirs who are minors. The district court found the note a valid claim against the estate, and allowed it. The administrator and guardian appeal.—*Reversed*.

*Bailey & Ballreich* for appellants.

*Ayres, Woodin & Ayres, E. C. Cory, and W. B. Crosby* for appellees.

LADD, J.—That an administrator, in the absence of statutory authority, may not bind the estate by executing a promissory note, is well settled. *Winter v. Hite*, 3 Iowa, 142; *Dunne v. Deery*, 40 Iowa, 252; *Deery v. Hamilton*, 41 Iowa, 17. Nor can an action be maintained thereon against the estate. *Winter v. Hite*, *supra*; *Rich v. Sowles*, 64 Vt. 408, 15 Lawy. Rep. Ann. 850, and note (s. c. 23 Atl. Rep. 723); *Schlicker v. Hemenway* 110 Cal. 579, 52 Am. St. Rep. 134, and note (s. c. 42 Pac. Rep. 1063); 11 Am. & Eng. Enc. Law, 932. Even when, in performing the duties of administration, expenses are necessarily incurred for services or purchases made, the parties with whom the administrator deals must look to him personally for compensation, and no action therefor can be maintained against the estate, though the claim be valid. All such allowances are made to the administrator, not as fixed by his agreements, but based on quantum meruit

alone. *Johnson v. Lehman*, 131 Ill. 609 (23 N. E. Rep. 435, s. c. 19 Am. St. Rep. 63, and note); *Bott v. Barr*, 95 Ind. 243; *Baker v. Moor*, 63 Me. 443; *Austin v. Munroe*, 47 N. Y. 360; *Harding v. Evans*, 3 Port. 221; *Steele v. Steele*, 64 Ala. 438; *Hallock v. Smith*, 50 Conn. 127; *Price v. McIvire*, 25 Tex. 769 (78 Am. Dec. 558). In the last case, however, it was suggested an action might be maintained against the estate on a claim allowed by the executor, but not otherwise. The apparent exceptions do not impinge these general rules. Recovery has been allowed from the estate for money or the proceeds of property appropriated by the executor, and used for its benefit and enhancement. *Simpson v. Snyder*, 54 Iowa, 577; *Dunne v. Deery*, 40 Iowa, 252; *Deery v. Hamilton*, 41 Iowa, 17. But this was not because of any contract, but on the ground that the estate had received the benefit, and should repay. Or, as stated in *De Valengin v. Duffy*, 14 Pet. 282: "Whatever property or money is lawfully recovered or received by the executor or administrator after the death of his testator or intestate in virtue of his representative character, he holds as assets of the estate, and he is liable therefor, in such representative character, to pay the party who has a good title thereto." Again, third parties have been permitted to maintain equitable actions on contracts of the administrator directly against the estate, where, because of his insolvency, or some other sufficient reason, their remedy against him is inadequate. But this is always based on a quantum meruit or benefit received. *Clopton v. Gholson*, 53 Miss. 466; *Mosely v. Norman*, 74 Ala. 422; *Dickinson v. Conniff*, 65 Ala. 581; *Norton v. Phelps*, 54 Miss. 467; *Hewitt v. Phelps*, 105 U. S. 393; *Willis v. Sharp*, 113 N. Y. 586 (21 N. E. Rep. 705). In all these actions, the recovery is based on a quantum meruit for something received by the estate, and the liability does not extend beyond the value retained by it.

II. The order of the judge on *ex parte* hearing, in the absence of any statute, added nothing to the powers of the administrator. This appears from *Deery v. Hamilton, supra*, where the executor reported the borrowing of the  
2 money, and her report was approved by the court.

It was there said: "This action of the court, without the course prescribed by the statute having been followed by the executrix, did not validate the transaction done without authority. As the law did not authorize the transaction, and prescribe that manner of converting the property of the estate into money, the approval of the court does not defeat its provisions. There is no statute authorizing an executor to borrow money, and, as security, convey the land of the estate. The course to be pursued in selling land of an estate is prescribed by statute. The whole transaction must be held invalid." Surely, the court or judge may validate any act, after done, which might have been authorized to be performed on an *ex parte* hearing. In *Winter v. Hite*, 3 Iowa, 144, Wright, J., speaking for the court, said: "With him [the administrator] it is not a mere question of fact whether he have authority, for there is no one to give it, but it is a question of law, and the law denies the authority." The court may direct the exercise of an existing power in a proper case, but additional powers cannot be created by the mere fiat of the court or judge, at least in the absence of any notice to the parties directly concerned.

III. The only property left by the deceased was real estate, and the necessity of selling it for the satisfaction of indebtedness did not exist. The duty of the administrator pertained exclusively to the care of such realty, and for this purpose he derived his authority solely from three sections of the Code of 1873, which we set out:

"2402. If there be no heir or devisee present and competent to take possession of the real estate left by such decedent, the executor may take possession of such real estate and demand and receive the rents and profits therefor, and do

all other acts relating thereto which may be for the benefit of the person entitled to such real estate.

"2403. Such executor or administrator, under the order and direction of the court, may apply the profits of such real estate to the payment of taxes and of debts and claims against the estate of the deceased in case the personal assets are insufficient.

"2404. Such executor or administrator shall account to such heirs or devisees for the rents, profits, or use of such real estate deducting therefrom the payments made under the preceding section, together with a reasonable compensation for his own services, to be fixed by the court."

But for these provisions, the administrator had no authority to interfere with the real estate or the rents and profits accruing. *Little v. Sinnett*, 7 Iowa, 324; *Gray v. Myers*, 45 Iowa, 158; *Hodgin v. Toler*, 70 Iowa, 21; *Kinsell v. Billings*, 35 Iowa, 154; *Foteaux v. Lepage*, 6 Iowa, 123; *Lepage v. McNamara*, 5 Iowa, 124; *Beezley v. Burgett*, 15 Iowa, 192. We are not agreed as to whether these sections enlarge the powers of the administrator so as to authorize him to borrow money from which to make needed repairs, or simply require him, on the contingencies

named, to exercise existing power on a class of  
3 property with which he formerly had no concern. But a majority does agree that if he may borrow money for such purpose it can only be done on due notice to those entitled to the estate. He is authorized to "do all other acts relating thereto which may be for the benefit of the person  
entitled to such real estate." It may readily be con-

4 ceded that, had the estate derived any benefit from these loans, it might be required to reimburse the plaintiff to the extent of such benefit. But it does not appear that any of the money was so used. There was not the slightest necessity for borrowing, and investigation would have assured the bank of the folly of making loans save on the administrator's personal obligation. As we have seen,

ordinarily, no recovery can be had except for value received and retained by the estate, and these statutes seem to have been worded in harmony with that rule. It is said, however, that because of the order the estate should be held to the payment of this note. These orders, with the notes, if binding, amounted to pledging or mortgaging the realty and the rents and profits to the loaner as security for the payment of the money borrowed. A mortgage might not have been given to raise a fund for the payment of the debts of the deceased. *Trust Co. v. Holderbaum*, 86 Iowa, 1, 11 Am. & Eng. Enc. Law (2d ed.) 1059. If authority existed, it was because of the provision of the statute quoted. But we have held notice of application for the sale of land essential to the validity of the proceedings. *Boyles v. Boyles*, 37 Iowa, 592; *Good v. Norley*, 28 Iowa, 188; Code, section 3324. The evident reason for this is that property, the title of which is in the heirs or devisees, may not be taken from them without opportunity of being heard. The statute does not disturb the title, but simply authorizes the personal representative of the deceased, as trustee, to care for it, in the interest of the owner. Can the heirs be divested of that title, or of their inheritance, by encumbering the realty or rents and profits without the opportunity of being heard? It is a wholesome doctrine, subject to few exceptions, which requires that those whose rights are to be affected must have notice, actual or constructive, of the pendency of proceedings against them or their property. No man's property should be taken from him without reasonable means being afforded to assert and protect his rights; otherwise the law might well be stigmatized as an instrument of injustice and oppression. *Hopkins v. McCann*, 19 Ill. 113; *Long v. Thompson*, 60 Ill. 27. As the inevitable effect of the orders was the pledging of the property of the heirs as security, and thereby depriving them of their interest therein to that extent, they were entitled to notice of the hearing of the

application made for that purpose. The orders, having been entered on *ex parte* hearing, to which no one except the administrator was a party, were void. The claim ought not to have been allowed.—*Reversed.*

GRANGER, J., dissenting.

EDWARD R. MASON et al. v. CITY OF DES MOINES et al.,  
Appellants.

**Paving Assessments: FRAUD: *Rights of tax payer.*** Fraud of a contractor in not using in the construction of a curbing the amount  
1 of cement required by the contract, so that a portion of the curbing is inferior to that agreed to be built, combined with the failure of the proper authorities to discover such defect and insist on its being remedied, vitiates the acceptance of such portion, and  
4 renders void the assessment of property abutting thereon, though the authorities were not guilty of actual fraud; and an injured tax payer may maintain an action to set aside the special assessment for the cost of the improvement.

**Appeal: SHORTHAND REPORT: *Documentary evidence.*** A certificate of a judge to the report of evidence is not insufficient for failure to identify documentary evidence introduced, if it states that the  
8 foregoing report and the documentary evidence therein referred to contains all the evidence introduced, and the exhibits are properly described and identified in the report, although they were not marked "*filed.*"

**NOTICE ON CO-PARTIES.** An appeal from a decree setting aside a special assessment for street improvements at the suit of owners  
2 of two abutting lots, will not be dismissed for failure to serve notice thereof on one of them, if the lots were entirely distinct and separately assessed.

**REVIEW: *Pleading below.*** In an action to set aside a special assessment, a claim that, as the improvement was not worthless, an  
5 allowance should be made for its value, cannot be considered on appeal when not presented by the pleadings or on the trial.

*Appeal from Polk District Court.*—HON. C. P. HOLMES,  
Judge.

FRIDAY MAY 26, 1899.

ACTION in equity to set aside special assessments made on account of curbing, and for other relief: There was a

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123 302  
108 658  
128 335

hearing on the merits, and a decree for the plaintiffs. The defendants appeal.—*Affirmed.*

*W. G. Harvison, J. K. Macomber and J. Edward Mer-shon* for appellants.

*W. G. Clark* for appellees.

ROBINSON, C. J.—The city of Des Moines is a city of the first class, and the other defendants are the members of its board of public works, its mayor, clerk, and Fred Stehm & Son, contractors. In the year 1892 the city entered into a contract with Stehm & Son, by which the latter agreed to construct, of sand, gravel, and cement, a curbing on West Grand avenue. A curbing was constructed, which was accepted by the city as a fulfillment of the contract. A part of the curbing was made in front of tracts of land owned by the plaintiffs, Edward R. Mason and William Foster, and assessments for the curbing have been levied upon the tracts. The plaintiffs allege that the contractors failed to use the quantity and amount of cement required by the contract, and failed to mix the materials and construct the curbing as required by it, and that they fraudulently used an inferior quality of cement, and did not use a sufficient quantity of it, and that the curbing constructed was not that required by the contract, but was worthless; that the members of the board of public works, acting in collusion with the contractors, approved the curbing, and, with the city engineers, acting as a board of assessment, assessed against the property of Mason two hundred and eleven dollars and sixty-eight cents, and against the property of Foster a sum not shown, on account of the curbing, and that certificates of assessment are about to be issued by the  
1 mayor and clerk. The assessments are also alleged to be invalid on other grounds. The relief demanded is that the assessments be set aside, and that the mayor and clerk be restrained from issuing certificates on account of the assessments. The defendants deny the alleged fraud and



failure to comply with the contract. The district court found that the allegations of the petition as to fraud were sustained, and that the plaintiffs were entitled to the relief prayed, but also found that all the proceedings on the part of the city, excepting the fraud, were valid and binding. A decree was rendered granting the relief demanded.

I. The notice of appeal was not served on the plaintiff Foster, and a motion to dismiss the appeal for that reason is submitted. Mason and Foster own separate and distinct tracts of land, and neither is interested in  
2 any manner in that owned by the other. Each tract is assessed separately for the curbing in front of it. The plaintiffs were not, therefore, seeking to protect a joint interest, although the alleged fraud and illegality affected alike each assessment. It is said in support of the motion that it is within the rule of *Goodwin v. Hilliard*, 76 Iowa, 555. It was unquestioned in that case that the person not served was a necessary party to a trial in this court and that service of notice of appeal on him was necessary, but that is not true of Foster in this case. Service of notice on him was not required, to give this court jurisdiction of the case, so far as it affects Mason's separate interests, and we have the right to consider and determine those interests so far as they are involved in this appeal. See *Fisher v. Chaffee*, 96 Iowa, 15, and cases therein cited. The motion to dismiss the appeal is therefore overruled.

II. It is claimed that the evidence offered and that introduced on the trial in the district court was not made of record and preserved as required by law. The certificate  
3 of the judge appended to the shorthand reporter's notes of the trial is as follows: "I hereby certify that the foregoing is the official report of the above-entitled cause; that it contains, together with the documentary evidence therein referred to, all of the evidence that was offered or introduced on the trial of said case, and all of the objections made and exceptions taken; and the said

official report in shorthand is hereby made a part of the record in the above-entitled case." The objection made to the certificate is that it does not sufficiently identify the documentary evidence introduced. It is not shown that the shorthand reporter's notes failed to identify, by proper description and reference, the exhibits offered in evidence, and it is shown that they were marked as exhibits. The presumption is that they were properly identified. It is said that they were not filed in the cause, and by that we understand they were not marked "Filed." It was said in *Jamison v. Weaver*, 87 Iowa, 72, that it was not necessary that exhibits be attached to or incorporated in the shorthand reporter's notes or translation, nor that they be formally filed; that if they were sufficiently identified in the report or translation, which was duly certified by the judge, it was sufficient. So far as we are able to determine from the abstract of the appellees, the certification in this case is within the rule of the case last cited, and is sufficient. See, also, *Dietz v. Pipe Co.*, 103 Iowa, 542. We conclude that the case is before us for trial on its merits.

III. The evidence fails to sustain the averments of the petition to the effect that the contractors used an inferior quality of cement, or that there was collusion between them and the board of public works, or that any city official was guilty of any intentional wrong, or that the curbing  
4 is worthless. There is evidence to the effect that the proportion of cement required by the contract was not used, the most satisfactory evidence of that kind being the testimony of the person from whom the cement was procured that but four hundred fifty-five and one-half barrels were furnished. The total length of the curbing done was nine thousand four hundred and ninety-two lineal feet, and one barrel of cement to each fourteen feet was required to fulfill the contract, or six hundred and seventy-eight barrels of cement. There is also evidence which tends to show

that the layers of concrete were not properly tamped. The evidence for the defendants tends strongly to show that the curbing was constructed as required by the contract. The inspector for the city, who superintended the work, testified, in effect, that it was made in all respects as required by the contract. He is corroborated by the city engineer, by one of the contractors, and by several laborers who were employed in the work. But for the evidence in regard to the length of the curbing constructed under the contract, the number of barrels of cement required by the contract for its construction, and the number actually used, we should conclude that the plaintiffs had failed to show that the contract was not fully complied with on the part of the contractors; but that, with other evidence, satisfies us that the required quantity of cement was not used, and that in consequence the curbing where the quantity was insufficient is inferior to that required by the contract. The board of public works examined the curbing, and required that defects which were discovered be remedied before it was accepted. The board relied upon the supervision exercised by the inspector and engineer. Actual fraud on their part is not shown. It appears, however, that some portions of the curbing were properly constructed, while other portions were not, and that the part in front of Mason's property is of the latter kind. The case, in principle, is like that of *Carthan v. Lang*, 69 Iowa, 384. The contractors, in not using the proportion of cement required by the contract were guilty of a fraud upon the city and the property owners. The neglect on the part of the officers charged with the duty of requiring Stehm & Son to comply with the contract, and to discover any failure to do so, operated as a wrong, which, with the intentional wrong of the contractor, constituted such a fraud as to vitiate the acceptance of so much of the curbing as was materially defective. It may be conceded for the purposes of this case that, in the absence of fraud, the acceptance of the curbing on the part of the city by the officers

charged with that duty would have been final, notwithstanding defects, but the fraud established makes that rule inapplicable.

IV. The appellants claim that, since the curbing was not worthless, an allowance for its value should be made; but we do not find that any question of that kind  
5 is presented by the pleadings, or was made in the district court. We do not discover any grounds upon which the decree of that court shall be disturbed, and it is  
**AFFIRMED.**

## SUPPLEMENT.

[These cases, because of the pendency of petitions for rehearing, did not reach me in time to be published in their chronological order.—REPORTER.]

108	664
122	167
108	664
127	577

J. M. CONRY, Appellant, v. ED. BENEDICT and JOHN BOWERS.

**Fraudulent Conveyance: EVIDENCE.** A conveyance of real and personal property made by the holder of the title to his father-in-law pending litigation with a third person, is not fraudulent where the sale had been long contemplated, an adequate consideration, (made up in part of an alleged debt due grantee from grantor  
1 said to have been evidenced by promissory notes held by grantee), was paid and the transfer was made in view of the intended removal from the state of the grantor who had never invested anything in the property and against whom it was not certain that a judgment would be recovered, and this, though grantee made sworn returns that he had no moneys and credits during the period he claims to have held said notes and though he subsequently aided grantee to avoid garnishment.

**SAME.** Where a conveyance from one relative to another is attacked by the grantor's creditors as fraudulent, fraud will not be imputed to them because of the relationship alone, but it or a state of facts from which it may be inferred, must be proved.

*Appeal from Ida District Court.*—HON. Z. A. CHURCH, Judge.

THURSDAY, OCTOBER 27, 1898.

**ACTION** to subject real estate to the payment of a judgment. Decree for defendants, and plaintiff appeals.—*Affirmed.*

*B. I. Salinger and C. S. Macomber* for appellant.

*Warren & Johnston* for appellees.

LADD, J.—The plaintiff recovered judgment against John A. Bowers for the sum of three hundred and nine dollars and five cents damages and one thousand and twenty-four dollars and fifty-five cents costs on the twenty-third day of April, 1895, on which execution was afterwards issued, and returned *nulla bona*. While the action in which this judgment was entered was pending, March 23, 1895, Bowers conveyed to Ed. Benedict the south one-half of the southeast one-fourth of section 28, township 87 north, of range 39 west of the fifth principal meridian, and certain personal property. This suit is brought to subject said land to the satisfaction of the judgment. When conveyed, the east forty acres was occupied by Bowers as a homestead, and appellant concedes, as to that forty, he is entitled to  
1 no relief. He insists, however, that the west forty was conveyed for the purpose of defeating the collection of any judgment Conry might obtain. It appears that Bowers began the action, and that judgment was entered in favor of Conry on a counterclaim, and that the trial was in progress at the time the deed was executed. Benedict took an active part in the trial by way of assisting Bowers, who was his son-in-law, but did so, as he claims, at the request of Bowers' attorneys. The price paid for the land (forty dollars per acre) was adequate. At the same time a bill of sale of personal property was made for the consideration of three hundred and seventy-five dollars. The price was not lumped, as contended, but was fixed by Bowers and the son of Benedict, for whom he was purchasing. This land had been bought by Benedict in 1887, and taken in the name of Bowers, who never paid anything on the purchase price. The consideration, two thousand dollars, was paid by assuming an existing mortgage of one thousand dollars, executing notes for six hundred and fifty dollars, and a cash payment of three hundred and fifty dollars given by Benedict to his daughter at the time of her marriage. The notes were sub-

sequently discounted, and Bowers gave his note in lieu thereof, covering the six hundred and thirty dollars paid, and this Benedict also gave his daughter. These sums amounted to one thousand nine hundred and thirteen dollars at the time of the sale, and were paid Mrs. Bowers. Benedict took up the mortgage, and this, with other loans, made up the one thousand two hundred and forty-six dollars, which he retained out of the purchase price of the farm. One hundred and seventy dollars was paid in cash, and two hundred and forty-six dollars paid to other creditors of Bowers. This was all Bowers' property except a judgment in Illinois. Some time after the sale Benedict aided Bowers in collecting that, in a way to avoid garnishment proceedings by Conry. It must be added that during this time Benedict made sworn returns to the assessor that he had no moneys and credits. His testimony of Bowers' indebtedness to him is in no other manner contradicted or impeached, and we cannot say that it should be rejected because of the general statements to the assessor. He may have considered it of no value. And, again, it is a well known fact, much to be regretted, that many citizens, in other respects worthy of entire confidence, either conceal or fail to disclose personal property, in order to avoid their just contribution to the support of the government. The general assembly might find it meet that property so withheld from the burden of taxation should be deprived of protection in litigation. In the absence of such legislation, however, this will only be considered a circumstance to aid the court in passing upon the particular issue presented. We are inclined to the conclusion that Bowers owed Benedict the amount claimed. It is said that the conveyance of all tangible property by Bowers is a badge of fraud. This is fully explained, however, by his purpose to move to Missouri, and the necessity of making payment to those who invested money in the property. While the courts will carefully scan and scrutinize the dealings between close relatives, yet the mere fact that the parties to a transaction are relatives will

not relieve him alleging fraud from establishing it or proving a state of facts from which fraud may be inferred. In other words, where a transaction between relatives is attacked on the ground of fraud, it will not be imputed to them because of the relationship alone. *Allen v. Kirk*, 81 Iowa, 658; *Fifield v. Gaston*, 12 Iowa, 218.

The only suspicious circumstance in the transaction is the purchase during the trial. This is met, however, by proof that the sale had been contemplated long prior to that time; that it was made for a son of Benedict; that Bowers was intending to leave the state; that an adequate consideration was paid; and that Bowers had never invested a cent in the property. Besides, at that time, it did not appear with any degree of certainty that Conry would ever recover judgment. Benedict purchased under an agreement, made long before it was known that Conry would obtain judgment, that Benedict should take the land at forty dollars per acre, unless Bowers could obtain, in the meantime, a higher price. While some of the circumstances are suspicious, all are consistent with an honest motive on the part of all parties to the transaction. We are content with the conclusion of the district court, and its decree is **AFFIRMED**.

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THE STATE OF IOWA V. OLE OLSON, Appellant.

**Seduction: JURY QUESTION: Chastity.** A finding in a trial for seduction that the prosecuting witness was of previous chaste character is warranted although there was evidence that on several occasions she had conducted herself imprudently with others.

**SAME.** The evidence is sufficient to establish the use of seductive arts on the part of one charged with seduction where the testimony of the prosecuting witness in that respect is strongly corroborated by the defendant's letters to her, though part of the arts used was a promise to marry if conception occurred.

**Indictment: SEDUCTION.** An indictment charging the seduction of a certain "*unmarried person*" of previously chaste character sufficiently avers that the prosecutrix was an unmarried woman.



**Requesting Instructions.** An appellant who did not ask further instructions cannot complain that those given were not full and explicit; hence, one charged with seduction cannot complain that the court in his charge did not refer to evidence concerning the prosecutrix's association with other men prior to the seduction, where the issue as to previous chaste character was fully submitted to the jury, and nothing further was asked.

*Appeal from Montgomery District Court.*—HON. A. B. THORNELL, Judge,

WEDNESDAY, DECEMBER 14, 1898.

DEFENDANT was convicted of seduction, and sentenced to eighteen months' imprisonment in the penitentiary. Defendant appeals.—*Affirmed.*

*R. W. Beeson* for appellant.

*Milton Remley*, Attorney General, for the State.

GIVEN, J.—The indictment charges that the defendant "did unlawfully and feloniously seduce, debauch, and carnally know one Mary Roll, an unmarried person of previously chaste character." The language of the statute (Code, section 4762) is: "If any person seduce and debauch any unmarried woman of previously chaste character." Defendant contends that the statute does make it a crime to seduce an "unmarried person," but expressly provides that the one seduced must be "an unmarried woman." "Person: A human being, as including body and mind; a man, woman, or child; an individual." Standard Dictionary. The words "unmarried person" in the indictment, taken alone,  
1 do not show whether that unmarried person was man or woman; but it is not in this narrow sense that we are to construe this indictment. The law has never recognized that the crime of seduction can be committed by any other than male persons, nor upon any other than female persons. "In applying the statute, the connection in which words are used is not to be disregarded." *State c. Hemm*, 82 Iowa, 610. In that case the words "unmarried female"

were used in the indictment, and it was held that the alleged defect did not affect any substantial right of the defendant. "The indictment must be direct and certain as regards \* \* \* (2) the offense charged." Code, section 5280. "The indictment is sufficient if it can be understood therefrom \* \* \* that the act or omission charged as the offense is stated in ordinary and concise language, with such certainty and in such a manner as to enable a person of common understanding to know what is intended, and the court to pronounce judgment according to law upon a conviction." Code, section 5289. The charge being seduction, and the person seduced being Mary Roll, every person of common understanding would know that it was intended to charge that Mary Roll was an unmarried woman; and therefore the indictment is direct and certain as regards the offense charged, and sufficient, under the statute.

II. There was evidence as to Mary Roll's association with other men prior to the alleged seduction, and defendant complains that this was not referred to in the instructions.

The issue as to previous chaste character was quite  
2 fully and fairly submitted to the jury, and nothing further was asked. It was not for the court to emphasize parts of the evidence by quoting or specifically referring to it in the instructions.

There was evidence tending to impair the credibility of the prosecutrix's testimony, and it is complained that the court did not sufficiently instruct on this subject. The instructions are plain and explicit on that point, and nothing further was asked. Other complaints against the instructions are equally without merit.

III. Defendant contends that the verdict is not sustained by the evidence, for that it shows that Mary Roll was not of previous chaste character, and fails to show that  
3 defendant used any seductive arts. There is evidence that Mary Roll, then fifteen years of age, had been in the company of other men two or three times

under circumstances that showed her to have acted very imprudently; but whether more should have been found from the evidence was for the jury to say. We cannot say that they were not warranted in finding that she was of previous chaste character. The prosecutrix testifies  
 4 that she refused to submit to the defendant unless he would promise to marry her if she became pregnant, and that he so promised, and thereupon she submitted. It is contended that this does not constitute seduction. But this is not all of her testimony on that subject. She testifies that he had been with her all evening, about two hours and a half, before the intercourse, "making love to me, kissing me, and having his arm around me. He had been doing that all evening before he went up to this place." His letters to Mary tend strongly to corroborate her, and to show seductive arts. See *State v. Hughes*, 106 Iowa, 125. While there are many facts disclosed in the evidence favorable to the defendant, we cannot say that the verdict is not sustained by the evidence.—AFFIRMED.

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### D. A. MOREY V. ELMER LAIRD, Appellant.

**Double Agency.** An agent who acts for two principals is required to  
 4 exercise the utmost good faith to each, and, if he cannot do so, he should at once end the agency.

**Settlement: CONSIDERATION.** A note given in settlement of claims  
 2 of doubtful validity is valid, if the maker had knowledge of all the facts affecting their validity at the time he executed it.

**Evidence.** Where plaintiff filed a verified reply to an answer, he is presumed to have known the contents of the reply, and of the  
 1 answer to which it was directed; and hence the question asked him on cross-examination, if he knew the contents of the answer when he verified his reply denying it, is immaterial.

**Directed Verdict.** Where a note was given in settlement of disputed claims, a direction of a verdict in favor of the payee cannot be  
 8 sustained, unless the facts essential to make the note valid are so apparent from the evidence that reasonable men could not differ as to the facts it established.

108	670
119	502

108	670
d143	94

RULE APPLIED. Defendant employed plaintiff as his agent to exchange  
3 his farm at forty-five dollars per acre for the business of a firm,  
which the firm agreed to do, at the actual cost of their stock,  
4 charging nothing for good will. Plaintiff falsely informed the  
defendant that the firm would not trade unless defendant would  
give five hundred dollars for the good will of their business and  
one member of the firm testified that plaintiff informed them  
that defendant wanted fifty dollars per acre for the farm. The  
exchange was made on this basis and defendant executed his  
note to plaintiff in settlement of his claim in ignorance of the  
fact that the firm had offered to exchange for the farm at forty-  
five dollars, without anything for the good will, etc. *Held*, that the  
evidence, if believed, constituted a defense to the note, and  
should have been left to the jury, and that a verdict directed for  
plaintiff was error.

*Appeal from Bremer District Court.*—HON. J. F. CLYDE,  
Judge.

WEDNESDAY, JANUARY 18, 1899.

ACTION at law to recover an amount alleged to be due  
on a promissory note. A jury was impaneled, and, after the  
evidence had been fully submitted, a verdict for the plaintiff  
was returned by direction of the court; and from the judg-  
men. rendered thereon the defendant appeals.—*Reversed*.

*G. W. Ruddick* and *D. A. Long* for appellants.

*E. L. Smalley* and *Gibson & Dawson* for appellee.

ROBINSON, C. J.—The note in suit was given by the  
plaintiff to the defendant on the twenty-seventh day of Feb-  
ruary, 1896, for one thousand one hundred and seventy-five  
dollars. The sum of four hundred and six dollars and sixty-  
five cents was paid thereon September 8, 1896. The plaintiff  
demands judgment for the amount of the note, after deduct-  
ing therefrom the payment made. The defendant admits the  
making of the note, and pleads as a defense in substance as  
follows: That in January, 1896, he was the owner of a farm  
of two hundred and five acres of land in Bremer county; that  
he employed the plaintiff as agent to negotiate for him an

exchange of his farm for the business of Donlon & Saylor, of Waverly; that the business of that firm was the buying and selling of wagons, buggies, and farm machinery; that by the contract of agency the farm was to be exchanged at the price of forty-five dollars per acre for the cost price in Waverly of the stock of the firm, and the plaintiff was to receive as compensation what he could get for the farm in excess of forty-five dollars per acre; that thereafter the plaintiff represented that the firm would not allow more for the farm than the price specified, and that, relying upon that representation, the defendant agreed to pay the plaintiff one hundred dollars to effect a trade of the farm at that price; that at the time the plaintiff, without the knowledge of the defendant, was also acting as the agent of the firm, and had been authorized to exchange its stock in trade, at its cost price in Waverly, without any charge for good will, for the farm at forty-five dollars per acre; that the plaintiff falsely represented to the firm that the defendant would not trade his farm at less than fifty dollars per acre, and falsely represented to the defendant that the firm would not trade its stock at its cost in Waverly for the farm at forty-five dollars, but in addition must have five hundred dollars for the good will of the business; that the defendant, relying upon such representations, permitted the plaintiff to make the trade on the basis of fifty dollars per acre for the land, and the cost of the stock in Waverly, and five hundred dollars in addition for the good will. The defendant pleads further that the plaintiff represented to him that the commission business of the J. I. Case Threshing-Machine Company at Waverly, which had been in the hands of Donlon & Saylor, was very profitable; that the plaintiff had great influence with the company, and would use it to procure the business for the defendant for two hundred and fifty dollars, although he had been offered that sum for his influence by one Garner, then doing a commission business in Waverly; that the defendant relied upon said representations, and agreed to

pay the plaintiff the sum stated for his influence, but that the representations were false, and were known to the plaintiff to be false when made. The defendant further states that after the trade with Donlon & Saylor was completed the plaintiff presented his claim against the defendant for one hundred dollars for services rendered in making the trade, for one thousand and twenty-five dollars for the amount received for the farm in excess of forty-five dollars per acre, and for two hundred and fifty dollars for influence used to procure the business of the threshing machine company; that the defendant did not at that time have any knowledge that Donlon & Saylor had offered its property, without charge for good will, in exchange for the land at forty-five dollars per acre, and in ignorance of the fact paid the plaintiff two hundred dollars, and made the note in suit; that by reason of the facts stated the note is wholly without consideration. The defendant further states that the plaintiff transferred the note, before due, and in fraud of the rights of the defendant, to a bank, to secure the payment of four hundred dollars and interest, and that the defendant was compelled to pay to the bank on the note four hundred and six dollars and sixty-five cents. Judgment is asked against the plaintiff for that sum, and for the two hundred dollars paid, with interest. The plaintiff, in reply, states that the note in suit was given after an adjustment of all the matters alleged in the answer, and in settlement of them. The verdict and judgment were for the full amount which appeared to be due on the note.

I. The reply contained a general denial, and was verified. The plaintiff was asked on cross-examination if he knew when he signed and verified the reply that the answer contained certain statements, which the evidence showed to be true, but which were denied by the  
1 reply. The purpose of the questions was to show that the witness had made statements, when not a witness, in conflict with his testimony, but objections to the question  
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were sustained. The plaintiff, in the absence of a showing to the contrary, is presumed to have known the contents of the reply which he verified, and of the answer to which it was directed, and both were formally introduced in evidence. If the answers sought had been permitted, they would merely have confirmed the presumption which then existed, and were immaterial. The court did not err in excluding them.

II. The note in suit and a check for two hundred dollars were given, after the exchange in question had been effected, in settlement of claims made by the plaintiff which are set out in the answer. These claims were dis-

2       puted by the defendant before and at the time the note was given, and if the defendant then knew all material facts which affected the validity of the claim, and the settlement was fairly made, the note is valid, even though the claims for which it was given were of doubtful validity.

*Rowe v. Barnes*, 101 Iowa, 302; *French v. French*, 84 Iowa, 655; *Keefe v. Vogle*, 36 Iowa, 87. But, to sustain

3       the ruling of the district court in directing a verdict, the facts essential to make the note valid must be so apparent from the evidence that reasonable men could not differ as to the facts which it established. *McLeod v. Railway Co.*, 104 Iowa, 139, and authorities therein cited; 6 Enc. Pl. & Prac. 683. The evidence for the plaintiff, if not disputed, would show beyond question that the note is valid, but we must examine the answer and testimony of the defendant to ascertain whether there was a dispute. The answer admits the making of the note, and avers that it was given in payment of the claim in controversy. The testimony of Laird is in some respects self-contradictory, but tends strongly to sustain the alleged fraud in the transaction involved in the double agency. The defendant testified, respecting the settlement had when the note was given, that he disputed the claim of the plaintiff for the two hundred and fifty dollar item, alleging that Garner had not

offered him that sum for the commission business; that the plaintiff then denied that he had said Garner had made that offer; and that, after some discussion in regard to the matter, the defendant "was finally willing to give him the \$250, and also the one hundred dollars. There was no dispute particularly as to the \$100." The testimony of the defendant shows that at the time the note was signed he learned that the plaintiff had, to some extent, acted in the transaction as the agent of Donlon & Saylor, but he did not know the particulars of the agency. In making the exchange, Donlon & Saylor received the cost of their stock in Waverly, and five hundred dollars in addition for the good will of the business, and the defendant was allowed fifty dollars per acre for his land. Saylor testified that during the latter part of the negotiations, which were carried on through Morey, the firm proposed to Morey to take the land at forty-five dollars per acre in exchange for the stock at its cost in Waverly, without any allowance for good will, but that Morey answered that the defendant wanted fifty dollars an acre, and that the offer would be useless. The defendant states positively and explicitly that he did not, when he transferred his land to Donlon & Saylor, nor when the note was made, have any knowledge of that offer. If the testimony of Saylor and the defendant respecting the offer was true,—and for the purpose of this appeal we must presume that it was,—Morey was guilty of a gross violation of his duty to both of his principals, for the plaintiff admits that he was authorized to exchange the land at forty-five dollars per acre. If he was guilty of the misconduct charged, it resulted in causing Donlon & Saylor to lose one thousand and twenty-five dollars, and the defendant five hundred dollars. The plaintiff denies the alleged misconduct, but we fail to discover any admission by the defendant, or any testimony on his part, which shows that he knew of the offer. The fact that the

4 plaintiff acted as the agent of each party to the transaction did not relieve him of the duty of loyalty to



each principal, to the extent of his employment. It is said in Mechem Agency, section 454, that "loyalty to his trust is the first duty which the agent owes to his principal. Without it perfect relation cannot exist;" and in section 455, that the agent must not put himself into such relations that his interests become antagonistic to those of his principal. "The agent will not be permitted to serve two masters, without the intelligent consent of both." See, also, Mechem Agency, section 67. It is the duty of the agent to inform his principal of facts material to his interests which are known to the agent. 1 Am. & Eng. Enc. Law (2d ed.), 1069. These are elementary rules. An agent who acts for two principals is required to exercise the utmost good faith to each, and, if he finds that he cannot do so, he should at once take steps to end the agency. If the testimony of the defendant is credible, he did not know that the plaintiff was acting for Donlon & Saylor until after the exchange was made, and at the time the note was signed; and there was nothing in the information he admits having received at that time which should have charged him with knowledge of the alleged breach of trust. He still had the right to presume, as against the plaintiff, that he had been faithful in the discharge of his duties. If the defendant is correct in his testimony, there was no consideration for the note to an amount greater than the sum apparently due on it, and he is entitled to recover on his counterclaim. The evidence required that the issues presented by the pleadings be submitted to the jury. The district court, therefore, erred in directing a verdict for the plaintiff, and its judgment is REVERSED.

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132 596

KIMBALL BROTHERS v. DEERE, WELLS & Co., Appellant.

**Contracts: CERTAINTY.** A contract which provides for the purchase of a specified aggregate number of sets of scales at a specified differing prices for different sets and that a certain number of 1 sets shall be taken in stated years is not so uncertain that no

action for breach may be bottomed thereon though it does not specify what number of each kind was to be taken.

**INSTRUCTIONS: Measure of damages.** At worst for the seller, such contract gave the defendant the option of taking the scales on which the seller would make the least profit. Hence, an instruction that the buyer had such an option and that presumably, he would have exercised it had he not broken his contract is not prejudicial to the buyer. The rule of the court assumed that the purchaser's breach caused the least possible harm and it cannot avail him to urge that he might have so selected as to cause greater injury by failure to buy.

**CONSTRUCTION.** Under a contract for the purchase of certain manufactured articles, providing that such articles should be made "from the patterns" of a certain company manufacturing such goods, and that "no change from said patterns" should be made without the consent of the purchaser, manufacturer was not required to use the identical patterns which had been used by the company referred to, but only to furnish articles in which there was no change, as to the several parts thereof, from the finished product of such company made from such patterns.

**SAME.** A contract requiring plaintiff to make certain articles for the defendant, according to certain specified patterns, was not broken where plaintiff changed such patterns, but did not use the changed patterns in making any goods for the defendant.

**MEASURE OF DAMAGES.** Where plaintiff was entitled to recover, in an action for damages for the breach of a contract for the purchase of a specified number of articles, of several different kinds, to be manufactured by plaintiff, and furnished, with "reasonable promptness," on defendant's orders, the measure of such damages for the articles not furnished was the difference between the contract price of the class thereof on which plaintiff would have received the smallest profit and the cost to plaintiff of manufacturing the number thereof which would have been required to fill such contract, making a reasonable deduction for the less amount of time required by plaintiff, its employes and factory, for the release from the trouble and responsibility incident to a full execution of such contract on plaintiff's part. The ordinary rule, difference between contract price and market value, should not govern because there was no agreement to have the scales ready for delivery at the beginning of the term fixed for delivery, but they were simply to be furnished up to the totals in given years as required by the purchaser.

**EVIDENCE: Interpretation.** Where defendant had contracted to purchase of plaintiff manufactured articles of certain specified kinds and the contract was not ambiguous, it was proper, in an action on such contract to reject evidence that plaintiff had manu-

factured and set aside for defendant articles of other kinds, not mentioned in such contract.

**Harmless Error:** OBJECTION BELOW. Where portions of a letter offered in evidence were excluded on objection made, and there was nothing prejudicial in the part admitted, the reading of a  
6 part of the excluded portion, without further objection, was not sufficient ground for the granting of a new trial.

**NEW TRIAL.** Remarks of counsel of a nature not to be commended, but purporting to have been made in response to statements of opposing counsel, or to be deductions from facts disclosed by the  
7 record, did not require that the party complaining thereof should have a new trial.

*Appeal from Pottawattamie District Court.*—HON. W. R. GREEN, Judge.

TUESDAY, JANUARY 24, 1899.

ACTION at law to recover on a contract for the purchase of Columbia scales, and on an account. There was a trial by jury, and a verdict and judgment for the plaintiff. The defendant appeals.—*Affirmed.*

*Harl & McCabe* for appellant.

*Flickinger Bros.* and *Clem. F. Kimball* for appellee.

ROBINSON, C. J.—A copy of the contract in suit is as follows: "This agreement, made this twentieth day of February, 1893, by and between Kimball Bros., of the first part, and Deere, Wells & Co., of the second part, both of the city of Council Bluffs, state of Iowa, witnesseth: That the said first parties have appointed the said second parties agent for the sale of the Columbia scales for the following territory, to-wit: The three western tiers of counties in the state of Iowa; all of the state of Nebraska; that part of South Dakota lying south of the tier of counties traversed by the Pierre Branch of the Northwestern Railroad; thence west to and including the Black Hills; all of the state of Wyoming; and that part of the state of Idaho traversed by the Union Pacific

Railroad. The said first party agrees to furnish Columbia scales made from patterns now in use by the Columbia Scale Company, and to make no change from said patterns on scales furnished the said second party without the consent of the said second party. The prices and terms to be net as follows: Two-ton scale, twenty-eight dollars; two and one-half-ton scale, twenty-nine dollars; three-ton scale, thirty-two dollars. The above complete with beam box, single brass beam, and test weight. Three and one-half ton scale, thirty-five dollars. This scale complete with beam box, double brass beam and test weight; four-ton scale, thirty-eight dollars; five-ton scale, forty dollars; six-ton scale, sixty-six dollars. After the first year, the price of four and five ton scales to be one dollar less than above. The latter three to be furnished with beam box, double brass beam, test weight, and weight book. And the said first party agrees to sell scales to no other party in or for the territory above mentioned, during the life of this contract, and further agrees to fill all orders made by the second party with reasonable promptness, and to guaranty their work. In consideration of this agreement upon the part of the said first party, the said second party hereby agrees to take from the said first party during the next twelve months, one hundred and fifty sets of scales, and to take one hundred sets of scales per year during the life of this contract. This contract to remain in force for five years from date. [Signed] Kimball Bros. Deere, Wells, & Co." Eighty-two sets of scales were delivered under that contract; and, the defendant refusing to accept other scales under it, this action was brought to recover the sum of ten thousand dollars as damages for its failure to do so. The plaintiff also claims ninety dollars and ten cents on account, which does not appear to be disputed. The defendant admits making the contract, but alleges that it elected to rescind it, for the alleged reason that the plaintiff changed the patterns from which the scales were made, used material and workmanship inferior to those required by the agree-

ment in making the scales, and produced scales which were not merchantable. The defendant further alleges that the plaintiff failed to pack the levers and casting, forming parts of the scales, in boxes of suitable strength for shipping, and as required by usage of the trade. The defendant also pleads, by way of counterclaim, that it incurred great expense in canvassing territory to enable it to carry out the contract, and has been damaged by reason of the alleged breach of contract by the plaintiff in the sum of five hundred dollars, for which it asks judgment. The plaintiff, in reply, alleges that, if there were deviations from the patterns as alleged, they were unimportant, did not constitute a breach of the contract, were made without the knowledge of the plaintiff, and under the direction or with the consent of the defendant. The verdict and judgment were for the sum of five thousand nine hundred and thirty-seven dollars and ten cents, besides costs.

I. The first claim made by the appellant is that the contract is void for uncertainty. This claim is based upon the fact that the contract required the plaintiff to furnish and the defendant to receive five hundred and fifty scales during the five years covered by the contract, and that it enumerated seven different kinds of scales, at prices ranging from twenty-eight to sixty-six dollars per scale, but did not specify the number of each kind which the defendant was required to accept. It is said the contract was not a contract of sale, but a contract to exercise an option to take one or more of several different and distinct articles.

1 The court below charged the jury that, under the contract, the defendant had a right to designate what sizes of scales it would take; that it had a right to select the scales on which the plaintiff would have realized the least profit; and since it could not be determined that the defendant would not have exercised that privilege, if the plaintiff was entitled to recover, its recovery would be fixed on the assumption that the privilege would have been exercised. Although the contract fails to designate the number of each kind of

scales which the defendant should take, the aggregate number which it was required to take was definite and certain, and the damage which would result to the plaintiff from the failure of the defendant to take any definite number of any one of the classes could have been ascertained with reasonable certainty. It is clear that if the defendant refused, without sufficient cause, to perform its part of the contract, the damages to the plaintiff could not have been less than it would have been had the defendant elected to take the kind of scales which would have yielded the plaintiff the least profit. To that extent the contract is definite and certain. It would be most unjust and unreasonable to permit the defendant to take advantage of its own wrong, on the ground that, had it done as it agreed, the profits of the plaintiff might have been greater than the amount allowed by the charge of the court. Since they could not, in any event, have been less than that amount, the defendant has no reason to complain of that portion of the charge.

II. The appellant complains of the refusal of the court to permit it to show that the plaintiff manufactured and set aside for the defendant several four-ton Junior scales, and perhaps other kinds not mentioned in the contract, as tending to show that the parties construed the contract to cover kinds of scales not enumerated in it. The offered evidence  
2 was properly rejected. The contract was not ambiguous, but specified particularly the kinds of scales and appurtenances to which it applied. If other kinds were desired by the defendant, and were furnished by the plaintiff, and credit therefor given on the contract, that fact would merely tend to show a waiver in favor of the defendant of the strict terms of the contract, but would not show that the contract was other than what it purported to be. The offered evidence was properly rejected; and that is true, for substantially the same reasons, of the evidence offered by the defendant to prove alleged changes in the pattern of certain goose necks used with some scales, and the cost of manufacturing them.

III. The court ruled during the trial that the clause, "The said first party agrees to furnish scales from patterns now in use by the Columbia Scale Company, and to make no change from said patterns on scales furnished the said second party without the consent of the said second party,"  
3 did not require the plaintiff to use the molder's patterns which had been used by the Columbia Scale Company, and charged the jury that "if, in the manner in which plaintiff manufactured the scales, there was no change in the finished product as to the several parts thereof, from the finished product for these parts as made by the Columbia Scale Company, then there would be no change in the patterns, within the meaning of the contract." The appellant contends that the patterns referred to in the contract were the molder's patterns, and that the finished product did not furnish the test as to whether there had been a change. The evidence showed that there had been some changes in two wooden patterns for brass scale beams which the plaintiff had obtained from the scale company, and there was some evidence to the effect that there had been changes in a clamp-casting pattern and in a heel-plate pattern for a six-ton scale. The evidence was sufficient to authorize the jury to find the following facts: The plaintiff made some slight changes in the two wooden patterns for scale beams, for the purpose of smoothing them where they had been roughened by use, and to make them work easier; that one of them was replaced with a brass pattern; that wooden patterns could not be used for more than from one hundred to two hundred castings, and that those furnished would have been worn out before the casting required by the contract could have been made; that the scale beams, when cast, were rough, and larger than the finished beams, and required planing and polishing to reduce them to the required size and condition; that the finished scale beams made by the plaintiff from the altered patterns were in all respects the same as those made before the patterns were changed. The

jury was also authorized to find that the change in the clamp casting was made by order of the defendant, and that the pattern for the six-ton heel iron was not changed after it was received by the plaintiff.

The contract must be given a reasonable interpretation to effectuate the intention of the parties to it. It would be unreasonable to conclude that the parties intended that the identical wooden patterns furnished by the scale company should be used after they had become so worn and out of repair that good castings could not have been obtained by using them. The matter of importance to the defendant was that the scales furnished to it should be made like those manufactured by the scale company, and, if that result was accomplished, it was immaterial whether the patterns were the identical ones furnished by that company or not. No doubt, the parties might have made the use of the identical patterns of the essence of the contract, but we are of the opinion that they did not do so. The language of the contract is not that the scales shall be made by the actual use of the patterns in molding, but that they shall be made "from the patterns," and that "no change from said patterns" shall be made without the consent of the defendant. If the word "from" were used in its primary signification, there would be no basis whatever for the claim of the defendant as to the necessity of using the same patterns; but the word as first used in the contract means much the same as "according to," and the negative of that is expressed by the phrase in which it is used the second time. We conclude that the interpretation placed upon the contract by the district court was substantially correct.

IV. The court charged the jury that if the plaintiff made scales in which the six-ton heel plate had been changed, but did not use the changed pattern in making the scales furnished the defendant, the contract would not have  
4      been broken by such change. It is contended that under the contract the defendant was entitled to six-



ton scales; that, if the pattern had been changed, it was impossible for the plaintiff to furnish such scales; and therefore no judgment should have been rendered against the defendant for its failure to perform the contract. We think the charge as to the matter in question was correct. The contract required the plaintiff not to make changes from the patterns in the scales furnished to the defendant, and the latter cannot defeat a recovery on the ground that a change was made which did not in any manner affect its rights. The defendant asked the court to instruct the jury that if the change in the six-ton heel iron pattern was made after the contract in suit was entered into, without the consent of the defendant, the change constituted a breach of the contract, and that the plaintiff could not recover for the breach of the contract which it alleges. We think that the court properly refused to so instruct the jury, for the reason, already stated, that the defendant cannot complain of a change which did not affect any scales which it ordered or desired to order. Had the plaintiff, by reason of the change, been unable to furnish the defendant scales it was entitled to demand under the contract, a different question would have been presented, which is not raised by the portion of the charge given and the instruction refused which are under consideration.

V. The court charged the jury that, if the plaintiff was entitled to recover, the measure of its damages for the breach of the contract for the scales not furnished was the difference between the contract price of the class on which plaintiff would have received the smallest profit, and  
5 the cost to the plaintiff of manufacturing the number of scales of that class which would have been required to fill the contract, making a reasonable deduction for the less amount of time required by the plaintiff, employees, and factory, and for the release from trouble, risk, and responsibility attendant upon a full execution of the contract on the part of the plaintiff. The defendant

insists that the rule thus given was erroneous, and that the ordinary rule for damages for the breach of contract to purchase personal property which is the difference between the contract price and the market value at the time and place of delivery should have been given. That the rule last stated is the one which should be applied in ordinary cases involving a breach of contract to purchase personal property may be conceded, but we are of the opinion that it should not have been applied in this case. The contract did not require the plaintiff to have the scales and appurtenances specified ready for delivery at the beginning of the term fixed by the contract, but only to fill orders in each year to the number of scales to be furnished during the year "with reasonable promptness," and the plaintiff was not required to manufacture the scales if the defendant was not to receive them. In other words, the plaintiff was not required to manufacture all of the scales required by the contract, and rely upon its ability to sell them to others in case the defendant refused to take them, but had the right to manufacture them only as required. If it had, however, in good faith, manufactured the scales, and there had been a market value for them, no doubt the rule contended for by the defendant would have applied. It is said in 2 Sutherland Damages (2d ed.), section 649, that, where a purchaser of an unmanufactured article refuses to accept it, "the manufacturer is not bound to complete it, make a tender of it, and, on the purchaser's refusal to accept it sell it on the market. He may recover the difference between the cost of making the article and the price agreed to be paid for it." That rule appears to us to be founded in reason, and to be supported by the authorities. *Hinckley v. Steel Co.*, 121 U. S. 264 (7 Sup. Ct. Rep. 875); *Walsh v. Myers*, 92 Wis. 397 (66 N. W. Rep. 250), and cases therein cited; *Lumber Co. v. Warner*, 93 Mo. 374 (6 S. W. Rep. 210); *Crescent Mfg. Co. v. N. O. Nelson Mfg. Co.*, 100 Mo. 325 (13 S. W. Rep. 503); *Tufts v. Lawrence*, 77 Tex. 526 (14 S. W.

Rep. 165); *Collins v. Delaporte*, 115 Mass. 159; *Cort v. Railway Co.*, 17 Q. B. 127; *Hosmer v. Wilson*, 7 Mich. 294; *Atkinson v. Morse*, 63 Mich. 276 (29 N. W. Rep. 711); *Hale v. Trout*, 35 Cal. 229; *Muskegon Curtain-Roll Co. v. Keystone Mfg Co.*, 135 Pa. St. 109 (19 Atl. Rep. 1008); *Tahoe Ice Co. v. Union Ice Co.*, 109 Cal. 242 (41 Pac. Rep. 1020); *Tufts v. Weinfeld*, 88 Wis. 647 (60 N. W. Rep. 992); 2 Benjamin Sales (Corbin's ed.), section 1121), and note 3; Tiedeman Sales, section 333.

It is suggested that, when the defendant rescinded the contract, the plaintiff had a number of scales on hand, and that, as to those scales, the rule of damages given by the court was wrong. The plaintiff had in stock scales at the time the rescission was declared, but our attention has not been called to any evidence which shows the number of scales of the kind on which the plaintiff made the least profit which it had on hand at that time, nor where the matter suggested was brought to the attention of the district court. We conclude that the rule as to the measure of damages given to the jury was correct as applied to the facts in this case.

Objections to the charge to which we have not referred are urged, but are disposed of by what we have said, or are without substantial merit, and need not be specially noticed.

VI. The appellant complains of rulings on evidence. One of these rulings related to the admission in evidence of a letter marked "Exhibit L." A portion of the letter was excluded on the objection of the defendant. We find  
6 nothing in the part admitted by the ruling of the court which could have been prejudicial. There is confusion in the record as to some parts of the letter, and it may be that a portion of it, to which an objection was sustained, was read; but, if so, it was read, perhaps inadvertently, without further ruling by the court, and without calling its attention to the fact that an objection had been sustained to a part which was read.

We have examined numerous other objections to rulings, and find that, although the correctness of one or two of such rulings may be somewhat doubtful, they related to matters of so little importance, or were so manifestly without prejudice, that we would not be justified in disturbing the judgment of the district court on account of them.

VII. The appellant complains of remarks made by attorneys for the plaintiff in presenting the case to the jury. Some of the remarks objected to are not to be commended,

but most of them purport to have been in response  
7 to statements made by attorneys for the defendant,  
and some appear to have been permissible, although somewhat free, deductions from facts disclosed by the record. We do not think it can be said that the record before us shows that a new trial should have been granted because of the alleged misconduct of counsel.

What we have said disposes of the material questions in the case. We do not find any sufficient reason for disturbing the judgment of the district court, and it is **AFFIRMED**.

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WEBSTER CITY GROCERY COMPANY, Appellant, v. LOSEY &  
DOTY *et al.*

**Attaching Creditors: MORTGAGES.** Where an attaching creditor purchases a prior chattel mortgage, and has the same assigned to  
1 him, it is not payment of the mortgage, within Acts Twenty-first  
General Assembly chapter 117, providing that attaching creditors  
may take possession of mortgaged chattels upon paying the mortgage debt.

**SAME.** An attaching creditor is not precluded from purchasing a prior mortgage lien upon the property attached and paying the mortgage debt, leaving to his attachment any surplus, by Acts  
1 Twenty-first General Assembly. chapter 117, providing that  
2 attachment creditors may take possession of mortgaged chattel  
property by paying or tendering the holder of the mortgage the amount of the mortgage debt, on the ground that such act extinguished the debt, and the remedy left to the attaching creditor was to pursue the course prescribed by the act under the attachment, since the statute makes no provision for an assignment or

purchase of a mortgage in such cases but merely for paying or tendering payment.

**SALE.** The fact that attached property was sold in bulk instead of at retail and for much less than it was actually worth will not avoid the sale as illegal and fraudulent although more money  
4 might have been received for the goods by a retail sale of them, where it is doubtful if more money would have been realized by the creditors because of the additional expense of closing out the stock in such a manner.

**Pleading: ADMISSIONS.** An averment that defendant, to enable the sheriff to maintain his attachment, procured an assignment of a chattel mortgage on attached property, which said transfer and  
3 assignment were made under Acts Twenty-first General Assembly, chapter 117, was admitted by the answer. *Held*, not an admission that the mortgage debt was paid, but that it was assigned.

*Appeal from Butler District Court.*—HON. J. F. CLYDE, Judge.

FRIDAY, JANUARY 27, 1899.

On the twenty-fourth day of December, 1894, Losey & Doty, co-partners doing business at Parkersburg, Iowa, executed and delivered a chattel mortgage upon their stock of goods, merchandise, and fixtures, for three thousand two hundred and thirty-two dollars and fifty-nine cents, to the Beaver Valley State Bank of Parkersburg, Iowa, to secure the payment of a certain promissory note held by the bank against them for that amount, with interest at 8 per cent. The mortgage was filed for record December 26, 1894. On the twenty-seventh day of December, 1894, the defendant the Smith, Lichty & Hillman Company sued out a writ of attachment out of the office of the clerk of the district court for Butler county, Iowa, and placed said writ of attachment in the hands of Thomas Walsh, sheriff of said county, for service. The defendant went to Parkersburg on that day to levy said writ of attachment. Before the attachment was levied, the defendant the Smith, Lichty & Hillman Company purchased and took an assignment of the mortgage which the Beaver Valley State Bank held upon the stock

of goods and merchandise and fixtures of Losey & Doty. Immediately after the Beaver Valley State Bank mortgage was assigned to the Smith, Lichty & Hillman Company, it was placed in the hands of the sheriff for foreclosure, and foreclosure of the mortgage was commenced according to its terms. The sheriff took possession of the stock of goods and merchandise under the mortgage, and closed the store. After closing the store under the mortgage, he levied the writ of attachment upon part of the goods, and on that day he served notice of foreclosure by posting written notices in three public places in said county. After foreclosure of the Beaver Valley State Bank mortgage was commenced, and the writ of attachment was levied, the defendants executed a chattel mortgage upon their stock of goods and merchandise to the H. Meyer Boot & Shoe Manufacturing Company, to secure payment of a note for two hundred and sixty-seven dollars and twenty cents. After the mortgage was executed and delivered to the H. Meyer Boot & Shoe Manufacturing Company, they executed and delivered to the Webster City Grocery Company (plaintiff) a mortgage to secure one hundred and sixty-eight dollars and eight cents. All of those mortgages by their terms were made subject to the Beaver Valley State Bank mortgage, which was assigned to the Smith, Lichty & Hillman Company, and subject to each other. On the same day mortgages were executed to the Williams-Hayward Shoe Company, the Boss Manufacturing Company, John Melhop, Son & Co., and the Cedar Falls Mill Company. All of these mortgages were made subject to each other, and all subject to the Beaver Valley State Bank mortgage, which was held by this defendant. The defendant and mortgagee, the H. Meyer Boot & Shoe Manufacturing Company, commenced an action in the district court of Butler county, asking a transfer of the foreclosure of said mortgage to the district court, and presented its petition; and a temporary injunction issued, restraining said sale. Thereafter the said Smith, Lichty & Hillman Company

moved to vacate said temporary injunction, and the motion was sustained, the temporary injunction was dissolved, and the sale ordered to proceed as advertised. On the seventeenth day of January, 1895, the stock of goods was sold at public sale to the Williams-Hayward Shoe Company, the H. Meyer Boot & Shoe Manufacturing Company, and the Rider-Wallis Company. This action is to recover against Losey & Doty on the note held by plaintiff, and the petition shows that the sale under the mortgage was illegal and fraudulent, as not being made upon legal notice, and as being made in pursuance of a conspiracy to defraud. The following is a part of the prayer of the petition: "That the alleged sale of the property may be declared fraudulent and void as to plaintiff; that an accounting be had between the plaintiff and the defendants, and after such accounting the plaintiff may be permitted to redeem by paying the prior mortgagees and lienholders such amount as may be found due them, and the interests, lien, rights of the defendants Williams-Hayward Shoe Company, the Boss Manufacturing Company, John Melhop, Son & Co., Cedar Falls Mill Company, and the Rider-Wallis Company be declared junior and inferior to plaintiff's said mortgage; that the plaintiff have a special execution for the sale of said mortgaged premises, and such other relief as the court may deem just and equitable in the premises." There was an amendment to the petition, and an additional prayer, which it is not important to set out, for the consideration of the questions presented. The district court gave to plaintiff a judgment on the note, and denied to it other relief, and the plaintiff appealed.—*Affirmed.*

*Geo. Wambach and Geo. M. Craig* for appellant.

*J. T. Sullivan* for appellee Smith, Lichty & Hillman Company.

*Courtright & Arbuckle and M. F. Edwards* for other appellees.

GRANGER, J.—I. It will be remembered that, after the writ of attachment was in the hands of the sheriff, the Smith, Lichty & Hillman Company obtained an assignment of the Beaver Valley State Bank mortgage, and gave the same to the sheriff for foreclosure, and the sheriff took possession of the goods by virtue of the mortgage, and closed the store. He then, by order of the Smith, Lichty & Hillman Company, levied the attachment on part of the stock of goods, and it appears that he set them in the front part of the store, and on the same day notices were posted for the foreclosure of the mortgage, and a sale of the goods was subsequently made in pursuance of such notice; and no further steps were taken under the attachment. Appellant claims that the assignment of the mortgage was obtained under the provisions of chapter 117, Acts Twenty-first General Assembly, which provides for attachment creditors to take possession of mortgaged chattel property by paying or tendering to the holder of the mortgage the amount of the mortgage debt; and it is said that, having taken the property under the provisions of that act, it was a payment of the mortgage debt, and the remedy left to the Smith, Lichty & Hillman Company was to pursue the course prescribed by that act under its attachment. By this we understand appellant to mean that the proceedings under the mortgage to sell were void as the mortgage debt was paid. Reliance is placed on *Cochrane v. Rich*, 142 Mass. 15 (6 N. E. Rep. 781), and *Baumgartner v. Vollmer*, \* Idaho, — (49 Pac. Rep. 729). Before looking to the application of these cases, it will be well to state that the record here discloses, not a payment, but a purchase, of the mortgage, by the Smith, Lichty & Hillman Company. The indorsement shows that it was "sold, assigned, transferred, and set over." The statute in question makes no provision for an assignment or purchase of a mortgage in such cases. It provides for paying or tendering payment. In the respect

\*NOTE.—At date of publication of this book this case is not published officially.—  
Reporter



of which we now speak, the statutes of Massachusetts and Idaho are the same. In the Massachusetts case the attaching creditor paid the mortgage under the provisions of the statute, and claimed an assignment of it, which the mortgagee refused, and the action was to compel it. The court held that he was not entitled to an assignment, as the mortgage was paid, holding that the purpose of the statute was a redemption by the attaching creditor. In the Idaho case the facts are more extended, but the following will be sufficient: The attaching creditor tendered payment of the mortgages under the statute, after levying his attachment, which payment was accepted. He then put his claim in judgment, took execution, levied upon the property, noticed the same for sale, and then postponed the proceeding to a particular date; and nothing further seems to have been done. Before the expiration of the time to which the proceeding was postponed, the plaintiff obtained copies of the mortgages, and delivered them to the sheriff, with directions to take possession of the property and sell the same. The mortgagor made demand for the delivery of the property, on the ground, among others, that the notes secured by the mortgages had been paid. The sheriff sold the property by virtue of the mortgages, and suit was brought by the mortgagor to recover its value. The court permitted a recovery, on the ground that, having adopted the proceeding by attachment, and having paid the mortgages, so as to entitle him to reimbursement from a sale of the attached property, he could not abandon that proceeding and adopt that of foreclosure. On rehearing, the court filed a supplement to the opinion, in which it adheres to its former conclusion, but makes prominent the fact that the mortgage debt was paid, and that it was not purchased. The court uses this language: "The facts clearly show that the appellant attached the personal property in question, and, in order to obtain possession thereof, paid the mortgage debt that existed against the property. He did not purchase the promissory note secured

by said mortgage, but paid it under the provisions of section 3389, Rev. St., and thus satisfied said mortgage lien. He could not thereafter foreclose said mortgage. The debt was paid, the mortgage lien satisfied." That case cites and quotes largely the Massachusetts case, and also cites 2 Cobbey Chattel Mortgages, section 718. We think this case is clearly distinguishable, from the fact that Smith, Lichty & Hillman Company did not pay off the mortgage debts, but purchased them, so that the firm stood in place of the assignor, as to the title. We have no doubt that the firm, in purchasing the mortgages, did so to aid its attachment proceedings by owning the prior lien, so as to have the advantage of both; and why might it not do so?

- 2 We know of no law to prevent an attaching creditor from purchasing a prior mortgage lien on the property attached, and then to pay the mortgage debt, and leave to his attachment any surplus there may be. That is what was done in this case. There is some language in the original opinion in the Massachusetts case that, considered abstractly, seems to us of doubtful import. Limited to the facts of the case, as it should be, it is not doubtful, and is not against our conclusion. In appellant's amendment to the petition is the following: "Par. 4. That the defendant Smith, Lichty & Hillman Company, in order to enable the sheriff to maintain his said attachment, procured an assignment of the said chattel mortgage from the Beaver Valley State Bank, which said transfer and assignment was made under the provisions of chapter 117, Acts Twenty-first General Assembly." The answer admits this, with other averments of the petition; and, because of it, appellant argues that there is a concession that the transfer of the mortgage was under the provisions of chapter 117, Acts Twenty-first General Assembly. The averment of the petition is, not that the mortgage was paid, but that it was
- 3 assigned; and it speaks of it as a transfer. It seems quite clear that the admission was not of the fact

of a payment, but an assignment or transfer of the debt. Other parts of the pleading strengthen this conclusion.

II. Appellant makes the claim that in selling the property the firm took into account the attachment, as well as the mortgage lien, and hence that the property could not legally be sold without appraisalment. The difficulty is with the facts, even if the legal proposition would be correct. The sale appears to have been alone for the payment of the mortgage debt, and none of the proceeds were applied on the attachment.

III. There is a complaint that the property was sold in bulk, instead of at retail, and for much less than it was actually worth, if its value is based on what it would be worth in a regular retail trade. The stock sold for  
4      about one-half of its value, as indicated by one inventory, and it is likely true that, even at a forced sale, more money might have been received for the goods by a retail sale of them; but it is exceedingly doubtful if more money would have been realized for the creditors, because of the additional expense of closing out the stock in such a manner. It is sufficient to say that the evidence by no means discloses a prejudice to creditors by the method of sale adopted.

Some other claims of appellant, based on unfair conduct of the Smith, Lichty & Hillman Company, we need not consider, because the facts as claimed do not appear from the record. It claims a right to redeem because of conditions broken. We discover no conditions broken to authorize such relief. The judgment will stand **AFFIRMED**.

J. N. CASSADY, Surviving Partner of J. P. & J. N. Cassady,  
v. D. E. H. GRIMMELMAN, D. E. H. GRIMMELMAN,  
Administrator of the Estate of W. R. Grimmelman,  
Deceased, Appellants, and J. W. DOANE *et al.*, Receiv-  
ers, Defendants, and MARGARET HAMILTON and A. W.  
CASSADY, Interveners, Appellees.

108	895
111	119

108	895
114	734

108	895
126	553
126	554

108	895
129	158

108	895
144	160

**Limitation of Actions: CHANGE OF STATUTE.** A new statute shorten-  
1 ing the time of limitations will not bar a recovery on a cause of  
action which would be barred at the time of its passage according  
2 to the shortened term, until the lapse of a reasonable time in  
which to commence the action.

**RULE APPLIED.** Under Code 1873, section 2541, providing that in  
computing the time for the commencement of an action, the time  
within which such action was stayed by statute shall not be  
counted; and section 2521, providing that no action shall be  
brought on a judgment within fifteen years after its rendition,  
and barring an action thereon after twenty years,—limitations on  
1 an action on a judgment do not commence to run until fifteen  
years after its rendition. Code 1877, section 3439, in effect  
October 1, 1897, amends Code 1873, section 2521, by providing  
that, in computing the period of limitation on such action, the  
fifteen years shall be included. *Held*, that the amendment does  
not bar proceedings to enforce a judgment commenced more than  
twenty years after its rendition, where such judgment was rendered  
in June, 1897.

ROBINSON, C. J., and WATERMAN, J., dissenting.

**Heirs: JUDGMENT AGAINST.** Under McClain's Code, section 3731,  
providing that damages for wrongful death shall be disposed of  
as personalty of the decedent, and shall not be liable for his debts,  
where he leaves a child, wife or parent, money recovered for the  
wrongful death of a person leaving a father and mother and no  
wife or child immediately descends to the father and mother in  
equal shares, and their interest therein may, after payment of  
3 the judgment into court, be applied in payment of a judgment  
against them, under Code 1873, sections 3150, 3154, authorizing the  
court, in proceedings to enforce a judgment, to direct moneys or  
property in the hands of a third person to be applied in payment  
of the judgment.

**REMEDIES.** An administrator, who is also an heir, is not subject to  
garnishment for his distributive share to satisfy a judgment

against himself individually, since the only effect of the proceeding would be to give plaintiff another judgment, of no more  
4 effect than the one he already has. And there being no adequate legal remedy, equity will compel a judgment debtor who, as administrator of an estate, has possession of moneys belonging to himself individually, as his distributive share, to apply such moneys in payment of the judgment.

EVIDENCE. In equitable proceedings, under Code 1873, sections 3150, 3154, to compel a judgment debtor to apply, in satisfaction of the  
5 judgment, moneys which, as administrator of the estate, he holds for himself individually, as his distributive share of such estate, decedent's unprobated will, not pleaded either in bar or in abatement is immaterial.

PARTIES. In a proceeding to subject to the payment of a judgment the interest of one of the next of kin of a decedent in a judgment  
6 recovered for negligently causing the death of said decedent, the other next of kin are not necessary parties.

*Appeal from Pottawattamie District Court.*—WALTER I. SMITH, Judge.

FRIDAY, JANUARY 27, 1899.

SPECIAL proceedings to subject D. E. H. Grimmelman's interest in a certain judgment rendered in his favor, as administrator, against the Union Pacific Railway, to the payment of a judgment against said Grimmelman. The trial court granted the relief prayed, and Grimmelman appeals.—*Affirmed.*

*Harl & McCabe* for appellant.

*Finley Burke* and *A. W. Askwith* for appellee.

*Wright & Baldwin* for appellee Margaret Hamilton.

*Clyde B. Aitchison* for appellees A. W. Cassady and others.

DEEMER, J.—The facts are not in dispute. On the first day of February, 1876, a co-partnership, doing business under the firm name of J. P. & J. N. Cassady, recovered judgment against D. E. H. Grimmelman for something over

four hundred dollars in the circuit court of Pottawattamie county. In January of the year 1895, D. E. H. Grimmelman, as administrator of the estate of W. R. Grimmelman, deceased, recovered judgment against the Union Pacific Railway Company in the sum of five thousand dollars for the death of said W. R. Grimmelman. That judgment was affirmed by this court. See 101 Iowa, 74. Plaintiff is the surviving partner of the firm of J. P. & J. N. Cassady, and, as such, instituted these proceedings, supplemental to execution, under provisions of section 3150 *et seq.* of the Code of 1873, to subject the interest of D. E. H. Grimmelman to the payment of the Cassady judgment. They were commenced on the first day of August, 1896, and the persons above named, as defendants, were made parties to the proceedings. W. R. Grimmelman was never married. He left surviving him, D. E. H. Grimmelman, his father, and M. A. Grimmelman, his mother, who are his sole heirs at law. The money due from the railway company was deposited with the clerk of the district court to be disposed of by order of court. The trial court subjected sufficient of the funds recovered to the payment of the judgment, and D. E. H. Grimmelman, administrator, appeals from this order.

Appellant's first contention is that plaintiff's judgment was more than twenty years old when this action was commenced, and is therefore barred. That contention is answered by the case of *Weiser v. McDowell*, 93 Iowa, 772. But it is said that Code, section 3439, has changed the rule announced in that case, and that plaintiff's judgment  
1 is barred. The section of the Code of 1873 (2521) which was construed in the *Weiser Case* has been amended so that a judgment is now barred by the statute in twenty years from its rendition. But it must be remembered that this action was determined in the lower court in June of the year 1897, and that the Code went into effect October 1, 1897. Now, while it is true that a statute of limitations relates only to the remedy,

and may be changed from time to time without impairing the obligation of contracts, yet the legislature has no power to cut off the remedy or bar a suit upon an existing cause of action instanter. A reasonable time must be given within which to prosecute existing causes of action under the new statute. *Maltby v. Cooper*, 1 Morris (Iowa) 59; *Berry v. Randall*, 4 Metc. (Ky.) 292; *Call v. Hagger*, 8 Mass. 423; *Osborn v. Jaines*, 17 Wis. 573; Cooley Constitutional Limitations (6th ed.) pp. 449, 450, and cases cited. The amendment to section 2521 of the Code of 1873 does not apply to plaintiff's judgment. If the legislature so intended it, it was doing that which the constitution forbids, and its act is of no avail.

II. Next, it is insisted that D. E. H. Grimmelman had no interest in the judgment which D. E. H. Grimmelman, as administrator, recovered against the railway company; that his interest was in the estate of his deceased son; and that, as he has no interest in the judgment, this action will not lie. The proceedings are under sections 3150-3154 of the Code of 1873, which provide for an equitable action after judgment, to subject any property, money, rights, credits, or interests therein belonging to defendant to the satisfaction of the judgment. It is provided that, in such action, persons indebted to the judgment defendant, or holding any property or money in which such debtor has any interest or the evidence of securities for the same, may be made defendants, and that the court may order the surrender of the money or securities therefor, or any other property of defendant in execution which may be discovered in the action. Doubtless it is true D. E. H. Grimmelman had no property interest in the judgment recovered by him, as administrator of his deceased son's estate, against the railway company. But the statute (section 3731 of McClain's Code) provides that the damages recovered in such cases shall be disposed of as personal property belonging to the estate of the deceased "except that if the

deceased leaves a husband, wife, child or parent, it shall not be liable for the payment of debts." As the amount recovered was not subject to the debts of decedent, it descended in equal parts to the father and mother of the deceased. Now, the statute (Code 1873, section 2438) further provides that the property itself shall be distributed in kind whenever that can be done satisfactorily and equitably. And section 2437 further provides that "the distributive shares shall be paid over as fast as the [administrator] can properly do so." It follows, then, that the money, when recovered, immediately descended to the father and mother of the deceased, and that it was not subject to the payment of his debts. When this action was commenced, the money had not actually been paid to the administrator, but during the course of the trial it was deposited with the clerk. When so deposited, D. E. H. Grimmelman surely had such an interest therein that it could be reached by proper proceedings. As sustaining our conclusions, see *Kelley v. Mann*, 56 Iowa, 625, and *Rhode v. Bank*, 52 Iowa, 375, which construe a somewhat similar statute. The cases of *Haynes v. Harris*, 33 Iowa, 516, and *Baird v. Brooks*, 65 Iowa, 40, are not in point, as an examination will show.

It is argued, however, that plaintiff's remedy was by garnishment of the administrator, and that, as he had this remedy by law, he could not bring an equitable proceeding. The case of *Shepherd v. Bridenstine*, 80 Iowa, 225, is a complete answer to that contention. It is there held,  
4     under an exactly similar state of facts, that garnishment will not lie. Some of us are disposed to doubt the doctrine of that case; but as it has stood for more than eight years, and as the profession generally have acted upon the rule there announced, we do not feel like overturning it. It is a rule of practice which ought not to change with the personnel of the court. There being no remedy by garnishment, and there being no other at law, equity will afford relief; and that relief must be by such proceedings as were



adopted in the case now under consideration. The statute allowing such action is remedial in character, and should be liberally construed, so as to give full effect to the purpose in view.

Appellant read in evidence what purported to be the last will and testament of W. R. Grimmelman, filed March 23, 1897, but which was never admitted to probate. Counsel

say in argument that this is a complete defense to  
5 the proceedings. It is true that the record shows that

April 19, 1897, was fixed as the time for the probate of the instrument. It does not seem to have been probated, however, and no proceedings other than those mentioned have been had with reference thereto. As the will was not probated, and as appellant did not plead the making of the will, either in abatement or bar, we have no occasion to further consider the matter, as it is entirely immaterial to any issue in the case.

Further, it is said that M. A. Grimmelman, mother of deceased, was a necessary party to the proceedings. We

do not think so. She had no property belonging to  
6 the deceased, and was not interested in any of the funds belonging to D. E. H. Grimmelman. Nothing that might be done in this case could in any manner affect her interest in the estate of her deceased son.

We have now disposed of all the controlling questions in the case, and are of opinion that the trial court did not err in subjecting a part of the money in which D. E. H. Grimmelman had an interest, which was then in the hands of the clerk of the district court to the payment of plaintiff's judgment.—AFFIRMED.

ROBINSON, C. J. (dissenting).—For reasons stated in the dissenting opinion filed in the case of *Weiser v. McDowell*, 93 Iowa, 772, I do not agree with so much of the foregoing opinion as approves and follows the decision in that case.

WATERMAN, J., unites in this dissent.

## CLEMENT, BANE &amp; COMPANY, Appellant, v. DRYBREAD.

108 701  
120 181

**Contracts: UNCERTAINTY.** Contract for the sale of goods whereby payment is to be made solely out of the buyer's profits, who is to

- 1 sell for cash, deduct certain expenses, render stated accounts
- 8 showing sales and remit to the seller each week all money taken in over and above the authorized deductions and once a year to furnish a complete inventory, is not void for uncertainty.

**BURDEN OF PROOF.** The burden is upon the buyer of goods under a contract providing for payment out of the profits alone but

- 1 requiring him to make periodical remittances of the proceeds of sales, to show that he had nothing to remit, where the seller insists that the terms of payment in the contract have ceased to be binding by his failure to make weekly remittances and that the indebtedness has become due and payable.

**Construction: CONTRACTS: *Court and Jury.*** The construction of a written contract is for the court and not for the jury and, if

- 1 evidence as to the circumstances has been admitted to aid in its
- 2 interpretation, the court should give the jury the meaning of the
- 3 writing upon the various hypotheses presented by the evidence.

**SAME.** It is for the court to determine the meaning of an ambiguous

- 1 written contract, in the light of parol evidence admitted to
- 5 explain it.

**RULE APPLIED.** Defendant sent a note payable to plaintiff in response to plaintiff's letter stating that he desired to use it in his bank, and that he would credit it on defendant's cash account, and

- 1 would take care of it when due. *Held*, in an action on the note,
- 5 that the letter constituted a written contract, the ambiguity in which could be explained by parol evidence as to the status of the parties when the note was executed, and hence it might be shown whether defendant was then owing plaintiff.

**SAME.** But evidence of plaintiff's declaration that the note was to be

- 1 used by him only as collateral was not admissible.

**SAME.** Defendant's statement to a third person, in plaintiff's absence,

- 1 before executing the note sued on, expressive of his reluctance
- 5 is inadmissible, though the statement was communicated to plaintiff who replied that the note was to be used only as collateral.

**SAME.** It was error to fail to charge that an original contract under

- 1 which plaintiff and defendant began business should not be considered as affecting the terms of the notes sued on, where the
- 5 contract was admitted on an issue as to the validity of an account sued on in the same action
- 7

**Exceptions.** The words "Given, Plaintiff excepts, Q, Judge," marked 3 on instructions when the charge was given, show sufficient 4 exception to the giving of the instructions.

**SAME** A case is reviewable on appeal, though no exception was 3 taken to the judgment, where exception was taken to the conclusion of law on which the judgment is founded.

**SAME.** A judgment entry worded, "judgment is rendered \* \* \* 3 against plaintiff for \$1,400, \* \* \* and plaintiff excepts. 4 It is therefore ordered, \* \* \* that the defendant \* \* \* recover \* \* \* judgment for \* \* \* \$1,400," shows that plaintiff excepted to the judgment.

**Appeal: REVIEW: Motion for new trial.** Exceptions to rulings on 2 evidence shown by the abstract to have been taken at the time the charge was given are sufficient, without a motion for a new trial, to entitle appellant to a hearing on such rulings, in the supreme court.

*Appeal from Palo Alto District Court.* —HON. W. B. QUARTON, Judge.

WEDNESDAY, FEBRUARY 1, 1899.

ACTION at law, aided by attachment, on two promissory notes and an account. Defendant filed an answer and counterclaim. There was a trial to jury, verdict for defendant on his counterclaim, and, from a judgment rendered thereon, plaintiff appeals.—*Reversed.*

*John Menzies, W. L. Crissman, and E. A. Morling* for appellant.

*B. E. Kelley and Clarke & Cohenour* for appellee.

**WATERMAN, J.**—While many of the facts were controverted below they are practically conceded so far as the questions presented on this appeal are concerned. Plaintiff firm was engaged in the wholesale clothing business in the city of Chicago. Defendant was a retailer in the same line, at Emmetsburg, in this state. Defendant started in business at Emmetsburg at the solicitation of plaintiff, and under a contract with it, which was partly written and

partly oral. The oral portion of the contract, as defendant claims it, was substantially as follows: Plaintiff was to furnish defendant all the clothing and other goods belonging to such a stock, necessary to start him in the retail business, at the usual wholesale, and current prices and thereafter was to supply such goods as defendant needed to keep up his stock. If plaintiff had not the required goods in its own stock, it was to pay for them when purchased by defendant of others. Defendant was to pay for all such goods to plaintiff by remitting the profits of his business, over and above actual running expenses, including fifteen dollars per week for his own personal use. Plaintiff was to carry all bills until such time as defendant could make payment therefor out of the profits of the business, payment being required only in case profits were made. The obligations of defendant under this contract were in writing. It is not material to any issue on this appeal that they be set out in full. Something will be said of them hereafter.

I. This controversy had its immediate origin in the following transactions: On the date therein mentioned, plaintiff wrote defendant as follows: "Chicago, Ill., April 22, 1896. G. W. Drybread, Emmetsburg, Iowa—Dear Sir: We have occasion to use some of our customers' paper in our banks, and we would like to have you sign and send us the inclosed notes, as follows: April 15th, 3 months, \$2183.17; April 15th, 4 months, \$1,816.83. We will credit these up to your cash account as same date as the notes, so it will make no difference to you; and, of course, we will take care of them when due, or whatever part of them is unpaid. Kindly attend to the matter promptly, and much oblige, yours, very truly, [signed] Clement, Bane & Company."

Defendant, in response, executed and sent the notes requested. Thereafter plaintiff sent this letter: "Chicago, Ill., October 13, 1896. G. W. Drybread, Emmetsburg, Iowa—Dear Sir: Please sign and send us the inclosed notes as follows: October 15th, 30 days, \$1,657.00;

October 15th, 60 days, \$2,343.00. With check for \$160 to take up your two notes dated April 15th, amounting to \$4,000 to cover the interest on same, and bring the matter forward on our books, and give us the paper in shape so we can use it. Kindly attend to the matter promptly, and oblige, yours, very truly, [signed] Clement Bane & Company." Again defendant complied, and sent the notes asked for. The first notes given were taken up and canceled by plaintiff, and it is upon these last obligations, with some items of account, that plaintiff's claim is founded.

II. The defense is that nothing was due plaintiff under the contract at the time the notes were executed; that they were given solely for plaintiff's accommodation, and were by it to be taken care of when due; and that, therefore, they were without consideration. The principal question for determination is whether the terms of the prior oral contract can be considered, either for the purpose of altering the terms of the notes or to show that they were without consideration. Some other matters are discussed, and very many others are suggested in argument. We shall notice all such as we deem material, in the course of what we have to say.

III. Before proceeding to the merits of the case, it is necessary that we dispose of some questions pertaining to the record, which are presented by appellee.

Plaintiff objected to the evidence offered to establish the prior agreement and negotiations leading up to the giving of the notes, and also claims to have excepted to the instructions in which the jury was told that such matters should be considered. It is charged by appellee that the instructions were excepted to en masse, in the motion for a new trial, and that the assignments of error based thereon cannot be considered, if any of the challenged instructions are good, as some unquestionably are, a motion for a new trial is not  
2 necessary to secure a review, in this court, of exceptions that have otherwise been properly preserved. Code 1873, section 3169; *Hunt v. Railway Co.*, 86 Iowa 15, and cases cited.

The objections to the testimony are all properly saved here, and each of the instructions complained of was marked as follows: "Given. Plaintiff excepts. W. B. Quarton, Judge." These exceptions, the abstract recites, were  
3 taken at the time the charge was given. This, we think, is sufficient to entitle plaintiff to a hearing of these matters, if the motion for a new trial is entirely disregarded. *Kellow v. Railway Co.*, 68 Iowa, 470.

Again, it is said that the judgment below was not excepted to, and therefore the case is not subject to review by this court. An exception to the judgment is not necessary where it has been taken to the conclusion of law upon  
4 which the judgment is founded. *Haefer v. Mullison*, 90 Iowa, 372, and cases cited. The order of the court overruling the motion for a new trial was duly excepted to in the case at bar, and exceptions to the admission of testimony and to the giving of instructions, as we have already seen, were properly preserved. This was sufficient. *Jordan v. Kavanaugh*, 63 Iowa, 153. Moreover, we think that proper exceptions were taken to the judgment. We set out such portion of the entry as will show upon what we found this belief: "And thereupon judgment is rendered by the court upon the verdict of the jury in favor of defendant, and against plaintiff, for \$1,400 and costs, including attorney's fees for \$300, and *plaintiff excepts*. It is therefore ordered and adjudged that the defendant, G. W. Drybread, have and recover of and from the plaintiff, Clement, Bane & Co., judgment for the sum of \$1,400, and the costs of this action, taxed at the sum of \$551.45." The exception, which we have italicized, seems to be clearly to the judgment, although it is not the conclusion of the entry.

Some objections are made to the assignments of error. We deem it sufficient to say that they are specific enough to present the question discussed.

IV. This brings us to the merits of the case. The issues presented were raised in different ways,—by motion

to strike from the answer, objections to testimony, and exceptions to instructions. The main question discussed however, is as stated. It is insisted by appellant that no evidence of the original contract should have been received or allowed any weight in determining the rights of the parties with relation to the notes in suit. Many cases are cited in support of the proposition that parol evidence of a contemporaneous oral contract is not competent to alter the terms of a promissory note or to show want of consideration, when the maker, as here, is admittedly indebted to the payee, though the debt may not be due when the notes are given. See, among other authorities, *De Long v. Lee*, 73 Iowa, 53; *Dickson v. Harris*, 60 Iowa, 727; *Farmer v. Perry*, 70 Iowa, 358. The defendant does not take issue with the rule announced in these cases, but he asserts that it has no application here, for the reason that the notes sued upon were but renewals of the first two given, and that the letters from plaintiff which we have set out, together with the notes, constituted a written contract, which should be construed in the light of

5      the situation of the parties at the time of the transaction. The writings being somewhat ambiguous, we concede this legal proposition, and hold that any evidence was admissible which tended to show the status of the parties at the time the notes were given; that is, whether defendant was then owing plaintiff anything, which was due and payable. The trial court, however, went far beyond this. We select but a single instance to illustrate our meaning.

Defendant was allowed to testify as to what he told one Nichols, prior to the execution of the notes, of his reluctance about giving them; and evidence was received to show that what was said to Nichols was carried to plaintiff, and that the latter asserted the notes were to be used only as collateral. This was clearly incompetent. The limit

6      to which parol evidence could properly go, as we have already said, was to show the circumstances and situation of the parties at the time of the execution of the

written contract, in order to aid in giving the writing a correct interpretation. See Greenleaf Evidence, section 277; *Grimes v. Centenary College*, 42 Iowa, 589. Furthermore, it was improper to admit what was said to Nichols. The statement was not made in the presence of any member of plaintiff firm. Nichols was not even in its direct employ. So, even if the subject-matter were not objectionable, the evidence should not have been received.

Testimony was admitted of various other matters relating to the conduct of the business by defendant, and to communications between him and plaintiff that had no bearing on the question of the liability on the notes. It would not be profitable to set the matters out in detail. The general rule which we have stated is sufficient to indicate the course to be pursued on another trial.

V. In the seventh instruction given by the court it is left to the jury to determine what the contract was between the parties when the notes were given. The contract being in writing, it was for the court to construe and determine it. The facts, so far as they were in dispute, with relation to the circumstances of the parties, were for the jury to find. But it was for the court to give the jury the meaning of the writing upon the various hypotheses presented by the  
7 evidence. What a contract means is always a question of law. When an agreement is in writing, it is the exclusive province of the court to construe it. *Rohrabacher v. Ware*, 37 Iowa, 85; *Daly v. W. W. Kimball Co.*, 67 Iowa, 132; *Vaughn v. Smith*, 58 Iowa, 558. We think the trial court erred in the respect mentioned, in this instruction. No part of the agreement made at the time these notes were given was in parol, so that the rule announced in *Peterson v. Railway Co.*, 80 Iowa, 96, does not apply.

VI. Two items of account were also included in plaintiff's demand, and it is urged on the part of appellee that the terms of the original contract under which defendant began business should govern as to these matters, and that the evi-



dence of the agreement was for this reason properly received. This may be, but the fact affords no justification for the court sending the case to the jury on the theory that the terms of the notes could be directly affected thereby. The instructions should have clearly distinguished between the notes and the account, and limited the jury, with relation to the former, to a consideration of the oral evidence, for the purpose only of finding whether defendant owed plaintiff anything which was due when the notes were given. Appellant claims that the original contract, if made as alleged by

defendant, is void for uncertainty. We are not prepared to so hold. The authorities cited to sustain this contention do not seem to be in point. Plaintiff had a right to give defendant its goods on any terms it saw fit. Payment was to be made out of defendant's profits only. He was to sell for cash, and deduct certain expenses, render stated accounts showing sales, etc., and remit to plaintiff each week all money taken in, over, and above the authorized deductions, and once a year furnish a complete inventory. This is according to defendant's contention. Plaintiff was thus to be kept informed as to the condition of defendant's business, the amount of his profits, and was to have possession and control of the cash. Knowing the cost price of the goods and the amount of the expenses, plaintiff would have knowledge of the exact profits, and could credit the same from time to time on defendant's account.

VII. It is said, however, by appellant, that there was testimony introduced on its part tending to show that defendant failed to comply with the terms of the contract, and therefore it ceased to be binding on plaintiff, and the indebtedness from defendant became due and payable. The

trial court was asked to give an instruction, informing the jury as to the legal effect of a breach of the agreement on defendant's part. There was evidence tending to show that after the 1st day of December, 1896, defendant rendered no statements and made no remittances to plaintiff,

although his contract called for him to do so each week. To this counsel respond that there is no showing that defendant had anything to remit after December 1st. This, we think, is not a sufficient answer. It does not appear but that he did have something, and the burden was on him to excuse his apparent default. At any rate, there is evidence that tends to show that he was in default in not making weekly statements of sales, as called for under his contract. The effect of this conduct should have been stated to the jury. It is fairly set forth in the ninth instruction asked by plaintiff, which the court declined to give.

VIII. Many errors are assigned upon the admission and rejection of testimony. None of a serious character, other than what we have already noticed, are likely to again arise. We may say, however, that we think more latitude should have been allowed in the cross-examination of defendant, as to the value of his time lost by reason of the levy of the writ of attachment. For the reasons given, the judgment is REVERSED.

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L. EVERINGHAM & COMPANY, Appellant, v. NICOLL HALSEY.

**Factors: ACCOUNT: Waiver.** Where a factor sends his principal statements of sales made, in which he does not state the gross price received on sales, but merely the net price after deducting

- 1 from the former price charges for cartage, for demurrage claimed
- 2 by the railroad company for detention of cars in unloading, and
- 3 for commissions, and the principal, with knowledge of the way the statements are made up, accepts them as correct, he is bound by them, if in fact correct.

**Settlements.** Where, on settlement of account, a principal gave his

- 4 factor a note for the balance due, in an action thereon, additional charges, then made by the factor, should be disallowed.

**SAME.** Where, on a settlement of account between a principal and his factor, the former was charged with a sum paid to the railroad as demurrage, which was refunded, but the principal credited

- 4 with only a part thereof, in action by the factor for balance on account the principal will be credited with the full amount as of the date of the settlement, it not appearing when it was refunded.

COMMISSIONS: *Fraud*. A factor cannot be deprived of commissions  
5 on account of an honest mistake in rendering his account.

Evidence: ANSWERS TO INTERROGATORIES. In an action by a factor  
for balance of account, his responses to interrogatories attached  
6 to defendant's answer, made from his books and papers, are entitled to the same weight as the accounts themselves.

*Appeal from Palo Alto district court.*—HON. W. B. QUARTON, Judge.

WEDNESDAY, FEBRUARY 8, 1899.

ACTION in equity to recover upon a promissory note, and to enforce by specific attachment a lien upon certain personal property pledged for its payment. Defendant answered, putting in issue the fact of indebtedness, and by counterclaim asked damages on the attachment bond, and also sought to recover a large sum which he claimed to be due from plaintiff on account. There was a trial to the court, and judgment in defendant's favor for eight thousand six hundred and fifty-three dollars and fifty-six cents, with interest. Both parties appeal. We shall denominate plaintiff the appellant.—*Reversed*.

*John E. Burke and Soper, Allen & Morling*, for appellant.

*Charles A. Clark, Clarke & Cohenour, and McCarty & Linderman* for appellee.

WATERMAN, J.—L. Everingham, who is doing business under the name of L. Everingham & Co., is a commission merchant in the city of Chicago. Defendant was for many years a dealer in hay and grain in the town of West Bend, in this state. The transactions between these parties began in the year 1889, and consisted of shipments of hay and grain by defendant to plaintiff for sale by the latter on commission. There is a claim in the pleadings that plaintiff was in fact the purchaser of much of the property so shipped,

and it appears that it was sustained by the trial court to some extent, though just how far we are unable to say from the decree. We can dispose of this matter very briefly. No such claim is urged by defendant's counsel in this court, and we find nothing in the record which lends it any substantial support. The controversy, as exhibited by the pleadings, is narrowed in another respect. No claim is made on account of any shipments except of hay, and only of the hay shipped after about the twenty-fifth day of July, 1891, as will more fully appear hereafter.

II. The note in suit was given July 31, 1894, and represented a balance of account supposed to be due plaintiff at that time. It is now insisted on the part of defendant that nothing was in fact owing by him when the note was given, but, on the contrary, plaintiff was indebted to him in a large amount. This claim of defendant grows out of the business dealings between the parties. These will have to be explained to some extent, in order that the contention of defendant may be fully understood. From the time these parties began doing business together, in 1889, until they ceased, about the first of the year 1895, defendant  
1 consigned to plaintiff some 1,260 cars of hay. Up to about July 25, 1891, plaintiff made returns to defendant, of the shipments, in the following form:

Entry I. Chicago, June 29, 1891.  
Folio 46. Account Sales by L. Everingham & Co.  
Commission Merchants.

For Account of Nicoll Halsey.

Received	Car	Freight	Description	Date Sold	Quantity	Price	Amount
June 22	5990	2800	Hay		8320	\$18 00	\$56 08
			290 Dem.		8480	12 00	20 58
			some badly stained		3880	8 50	14 15
			loose		110		85
							\$91 11
Charges, etc.:			Freight and inspection . . . . .			\$80 00	
			Cartage, sampling, weighing . . . . .			45	
			Storage, insurance, interest on freight, commission . . . . .			8 87	
							\$84 32
			Net proceeds . . . . .				\$56 79

E. & O. E.

We set out a filled blank as it appears in the abstract. It may save something in the way of explanation. As we have already said, nothing is claimed by defendant on account of shipments prior to the date last mentioned. But about this time plaintiff ceased making returns such as that set out. He began and continued during their further relations rendering accounts in this form:

Entry 8

(17)

Chicago, Jul. 2, 1892

Folio 14.

L. Everingham & Co., Commission Merchants.  
Bought of Nicoll Halsey, West Bend, Ia.

Date	Car	Freight	Description	Quantity	Price	Amount
18	6426	34 28	Hay	9-440- <del>1</del> 10-020 130	\$7 00 6 00	\$33 04 30 06 25
Hot and damaged,						\$63 35
Charges: Freight, inspection.....						\$34 28
Sampling, weighing.....						45
						\$34 73
Credited in account.....						\$28 62
E. & O. E.						

It will be observed that in this return the price received for the hay is given, sixty-three dollars and thirty-five cents, and there is deducted from this the sum of thirty-four dollars and seventy-three cents, leaving a net sum due defendant of twenty-eight dollars and sixty-two cents. It is not denied that the defendant received the whole of the net balances shown by these returns. But he says that the hay in each instance sold for more than was reported, and that his net balance should have been much larger. The testimony shows without dispute that the price reported was not in fact that for which the hay was sold, but that from the price actually paid there was deducted cost of delivery in cases where delivery had to be made, car service, and commissions upon the sale; that, after these deductions were made, the balance was reported to defendant as the price received for the hay; and the accounts rendered show this

price, with the further deductions therefrom of freight and weighing. "Car service" is explained as meaning a demurrage charge made by the railway companies of one dollar per day on each car detained over forty-eight hours in unloading, and "cartage" is a charge made for the expense of delivering hay when the purchaser did not take it on the track.

III. It is claimed by defendant that these charges, for cartage especially, and for demurrage in part, are wholly fictitious, and are trumped up to swell the account against him. He insists that they should not be allowed, and that because of this fraud no commission should be allowed plaintiff. This claim seems to have received the sanction of the trial court, for the amount of the judgment given, about equals the total of these charges. We may accept the law as stated by counsel for defendant,—that plaintiff was required to keep accurate and full accounts and render correct statements to defendant. But as to the statements of account we may say that if defendant knew the manner in which they were made up,—that cartage, car service, and commissions were deducted from the gross price received

for the hay, and the balance given in the account as  
3 the price received,—and if he accepted these statements without objection, he cannot now claim anything merely because of the form in which the account was made out. If he can recover in such case it must be on the ground that such expenses were not, in fact, incurred by plaintiff. Doubtless the burden is upon plaintiff to show that these items were legitimate and proper charges.

IV. Did defendant know that these charges were made against him, and that his net balance, as shown on the statements rendered, represented what was left from the gross proceeds after paying, not only freight and weighing, but also cartage, car service, and commissions? We think he did, and we have several reasons to assign in support of the conclusion. It is admitted that prior to about July 25,

1891, the business was conducted by plaintiff in an honest and satisfactory manner. This was during the time when the commission blanks were used for making returns. Upon these blanks the commission which was fifty cents per ton, appeared as a charge; but no charge appears for cartage. Yet we find that during that time cartage was charged on more than one-fifth of all the cars shipped. It does not appear on the account as an item of charge. It was, as in the later instances, deducted from the gross price of the hay, and the statement gives the remainder as the amount for which the hay was sold. We need not take the time to set out the reasons given by plaintiff for changing the form of blank upon which the returns were made; nor is it material to consider whether the custom in Chicago would warrant this method of making returns. If, as we have heretofore said, defendant understood the returns, and accepted them without objection, he is bound by them, if they were in fact correct. As a further reason in support of the conclusion of fact above announced, we have to say that defendant's own testimony shows that he knew the expense of delivery would be paid out of the proceeds of the hay, when delivery had to be made. So, also, with reference to commissions. Defendant admits that he knew a commission was charged, and that the amount thereof was fifty cents per ton. While the purchase blanks did not show this charge in terms, it is evident that defendant was aware the balance shown was arrived at by deducting plaintiff's charge for selling. But there is still further evidence on these points. It is shown that in a number of instances a report of the price actually paid or agreed to be paid was sent defendant as soon as the sale was made, and that this was followed in a few days with the statement, on the purchase blanks, of the same sale, in which the price given as received for the hay was less than the amount stated in the notice by the sum of cartage and commission. No complaint was ever made by

defendant of these apparent discrepancies, which tends strongly to show that he understood them. In addition to all this, two of plaintiff's salesmen, who testify in his behalf, say that defendant fully understood the purchase blanks, and knew that cartage charges were made; and plaintiff swears that this form of return was adopted for defendant's accommodation, and with his full consent. Altogether we are convinced that defendant was well aware that he was charged frequently for cartage and demurrage, and always for commissions. If he did not know the exact amount of the first items in the case of each shipment, it was only because he did not care to inquire.

V. There is no evidence upon which to rest a finding that these charges, or any of them, were fictitious. They are verified by a number of witnesses. An account seems to have been kept of them by plaintiff. While objection is made to the form of the account, we do not consider it as of weight. The charges for commission and demurrage, especially, are established beyond dispute.

VI. There are some additional charges made now by plaintiff for telegrams, ninety-five dollars and eighteen cents, and for car service, etc., two hundred and thirty-five dollars and forty-eight cents, which we are not inclined to allow. We shall accept the giving and receipt of the note as a settlement of accounts, with the exception of one item, for which defendant is admittedly entitled to credit. Of  
4 demurrage paid by plaintiff and charged to defendant, the sum of three hundred and twenty-five dollars was refunded by the railway companies. On the accounts rendered, defendant was through mistake given credit for only thirty-one dollars. He should have a further credit of two hundred and ninety-four dollars on this account. We have no way of ascertaining the date or dates when this money was refunded, so we shall allow the credit as of the date of the note. This will leave a balance due plaintiff of two hun-



dred and twenty-nine dollars and one cent, upon which he is entitled to interest at 8 per cent. from January 11, 1895. We know of no rule that will punish plaintiff, by loss of his commission, for an honest mistake, as this appears to have been. See *Rochester v. Levering*, 104 Ind. 562 (4 N. E. Rep. 203); *Sampson v. Iron Works Co.*, 6 Gray, 120.

VII. It is thought by appellee that the evidence offered by plaintiff to support his account is not of a satisfactory character; that the books of account should have been produced. This evidence was in the form of responses to interrogatories, which were attached to the answer of defendant. These answers were made from books and papers in plaintiff's possession. No reason appears why we should not accord the facts therein stated the same weight as if disclosed by accounts offered on the trial. What we have said disposes of all claims on the attachment bond. The district court found, and correctly, that the writ of attachment was not maliciously issued, and the only ground for claiming that it was wrongfully sued out was that nothing was due plaintiff at the time. This, we have seen, is not correct. The case will be remanded for a decree in harmony with this opinion.—REVERSED.

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SARAH E. LEE, Administratrix of the Estate of Thomas Lee, Deceased, v. MARION SAVINGS BANK  
and JAY J. SMYTH, Appellants.

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111 175

**Fraud: EVIDENCE.** A debtor engaged in shipping poultry, to prevent his creditor from seizing the shipments, had them made in the name of a president of a bank with which he did business. Afterwards the debtor gave his note, secured by a mortgage on all his property, to the bank, to obtain an alleged credit at the bank; and a certificate of deposit, payable on presentation, was properly indorsed and delivered to a third person, to whom the debtor was not indebted, and left in his hands for six months.

- 1 No reason therefor appeared, other than it was to hinder and defraud said creditors. Afterwards the certificate was pledged
- 2 as collateral. The president was thoroughly acquainted with the debtor's circumstances and business, and knew of the debt, and of the debtor's desire to avoid paying it. *Held*, that the note and mortgage are fraudulent as against said creditor.

**KNOWLEDGE OF BANK PRESIDENT.** That the president of a bank knows of the desire of a shipper of goods to prevent the shipment from being seized on a certain claim against him, does not deprive

- 1 the former of the right, in good faith, to secure the bank for advances made to the shipper by having the shipments changed to his own name.

**SAME.** A bank is bound by the acts of its president in respect to a transaction between him and a third person and by his knowledge of the latter's purpose to defraud his creditors in such transaction.

**EVIDENCE: Declarations.** Declaration of a president of a bank made when he was not transacting the business of the bank are not

- 4 admissible against it.

**Estoppel: EXECUTOR AND ADMINISTRATRIX.** Knowledge by a mother of the fraudulent intention of her son in executing a mortgage will not estop her to maintain an action as administratrix of the

- 6 son to set aside the mortgage as fraudulent as she stands as the representative of the estate and its creditors, and such is the case even though she is one of the principal creditors.

**EVIDENCE.** In an action by an administratrix to cancel an alleged fraudulent mortgage executed by the intestate, evidence of what he told her, before his death, concerning the mortgage, is inadmissible to show that she had knowledge of its invalidity before her

- 5 appointment, and of the subsequent sale of the mortgaged property, since the intestate, if living, could not testify to making such statements.

*Appeal from Linn District Court.*—HON. G. W. BURNHAM,  
Judge.

WEDNESDAY, APRIL 5, 1899.

**ACTION** in equity to cancel a certain mortgage on real estate, and the promissory note secured thereby, executed by deceased to the defendant bank, and for an accounting by the defendants for all money received by them on behalf of the deceased, and for judgment for the amount found due.

Issues were joined, as will hereafter appear, and, on a hearing had, decree was rendered in favor of the plaintiff as prayed, and judgment against "the defendants" for one thousand two hundred dollars, with interest at six per cent. per annum on one thousand dollars from June 1, 1893, and on two hundred dollars from July 1, 1893, and for costs. The defendants separately appeal. *Reversed* as to Defendant Smyth.

*Jamison & Smyth* for appellants.

*M. P. Smith & Son* and *D. E. Voris* for appellee.

GIVEN, J.—I. Thomas Lee, an unmarried man, resided for a number of years with his mother, Sarah F. Lee, in Marion, Iowa, prior to his death, which occurred on February 27, 1893. For some ten years prior to his death, Thomas Lee was extensively engaged in buying, dressing, and shipping poultry to the New York and Chicago markets, and continued in that business up to the time of his death. Mr. Lee's means were limited; he having no property other than the house and lot covered by the mortgage in question, where he and his mother resided, and the buildings and sheds on leased grounds, in which he carried on his business, together with the portable coops and other appliances used in handling poultry. It does not appear that deceased had any considerable sum of money, except that embraced in his account with the First National Bank, and that involved in this controversy. His business for the two years preceding his death was quite extensive, and was largely, if not entirely, carried on with borrowed money. During these years the defendant bank and the First National Bank, though separate corporations, were doing business in the same place in Marion; the officers of the First National Bank being stockholders and officers of the defendant bank, and the defendant Smyth being president of both banks for most of the time under consideration. Thomas Lee trans-

acted his banking business through the First National Bank, checking on that bank to pay for poultry purchased, and expenses of the business, and drawing drafts in its favor against shipments made. From the latter part of the winter of 1891 the bills of lading were either assigned to Jay J. Smyth, or the shipments made in his name, for the use of the First National Bank, and the proceeds credited to Thomas Lee on his account. On the third day of May, 1892, Thomas Lee executed to the defendant bank his mortgage on said house and lot to secure his promissory note of that date to the defendant bank for two thousand dollars, payable six months after date, with interest at seven per cent. per annum. On the same day he executed a chattel mortgage to the defendant bank, to secure payment of the same note, on said buildings, sheds, poultry boxes, and shipping coops on said leased premises. No money was paid to Mr. Lee, but the amount (two thousand dollars) was placed to his credit by the First National Bank. On the same day Mr. Lee drew his check on the First National Bank for two thousand dollars, and received therefor a certificate of deposit for that amount, payable to William G. Thompson "on return of this certificate properly indorsed. \* \* \* This deposit not subject to check." This certificate was delivered to William G. Thompson, but whether Jay J. Smyth was present, or had knowledge of the fact, is in dispute; also, the purpose for which it was delivered. Mr. Thompson retained the certificate until January 16, 1893, when, at the instance of Mr. Lee, and in his presence, he delivered it, indorsed, to Jay J. Smyth. On that day Thomas Lee executed another promissory note to the defendant bank for three thousand five hundred dollars, due ten days after date, with eight per cent. interest; and this certificate of deposit was attached thereto, to be held as collateral security. Soon after the death of her son, the plaintiff, Sarah F. Lee, was appointed to administer upon his estate, on her own application, wherein she made oath "that the deceased left personal property, as

she is informed, amounting only in value to the sum of less than two hundred dollars." On the fourth day of March, 1893, she filed an inventory showing the personal property to consist of the slaughtering house and fixtures, "subject to a mortgage of \$2,000 given to one Jay J. Smyth, of Marion, Iowa." Claims aggregating about seven thousand dollars, including one for six thousand dollars to plaintiff, Sarah F. Lee, for money borrowed in July, 1890, were presented and allowed. On the thirtieth day of June, 1893, plaintiff filed her petition in probate, asking an order to sell the chattel property covered by said mortgage, to apply on the note secured thereby. An order was made, and after an appraisement the property was sold to one Wheeler for one thousand two hundred dollars, one thousand dollars of which was paid to the defendant bank June 30th, and the remaining two hundred dollars July 1, 1893, and credited on said two thousand dollars note. There is a controversy as to whether this application for appointment, inventory, and petition was framed at the dictation of Mr. Smyth.

II. We first consider the case as presented on the appeal of defendant Jay J. Smyth. The only claim made against him in the petition was in the eleventh paragraph thereof, and as to this the plaintiff dismissed. Therefore there was no action pending against Mr. Smyth. But through inadvertence the judgment was rendered against "the defendants," instead of the defendant bank. The judgment as to the defendant Smyth is reversed, and judgment will be entered dismissing as to him.

III. The contention being solely between the plaintiff and the defendant, the Marion Savings Bank, we are not called upon to make an accounting with Jay J. Smyth or the First National Bank, and therefore much of the evidence taken is not applicable. Plaintiff's contentions are that the notes and mortgages executed by the deceased to the Marion Savings Bank were executed and received to hinder, delay, and defraud the creditors of Thomas Lee, and especially F.

C. Linde & Co., and that said two thousand dollar note is without consideration. Wherefore it is claimed that said mortgages and the two thousand dollar note are fraudulent and void, and that plaintiff is entitled to recover the amount realized from the sale of said chattel property. These claims the defendant bank denies, and herein we have the issues to be considered. The defendant bank presents a number of objections to testimony offered by plaintiff, as immaterial, which objections are in the main well taken. We will not extend this opinion by considering these objections in detail, but proceed to dispose of the case upon the competent and material evidencẽ, as we find it to be.

IV. It appears that Thomas Lee executed his promissory note for one thousand dollars to Harry Dowie, of New York City, due April 5, 1891, on account of business transactions between them, which note Dowie transferred to F. C. Linde & Co., of the same city. This claim Mr. Lee evidently regarded as unjust, and was averse to paying the same. In the winter of 1891-92 he made a shipment to Dowie, and drew against it; but Dowie allowed the draft to go to protest, as Lee and Smyth supposed, for the purpose of

allowing Linde & Co. to seize the shipment. There-  
1 upon Smyth, with the consent of Lee, ordered the shipment to be delivered to A. G. Reed, to whom all future New York shipments were made, and in the name of Smyth. We are in no doubt that Mr. Smyth knew of Mr. Lee's desire to prevent his shipments from being seized on the Linde & Co. claim; but that did not deprive him of the right in good faith of securing his bank (the First National) for advances to Lee, by having the shipments in his name. Lee's house and lot and his packing establishment were open to be pursued by Linde & Co. until covered by the mortgages of May 3, 1892, given to secure Lee's note for two thousand dollars to the defendant bank. Lee, though a borrower in need of money in his business, got no money on that transaction, but was credited with the amount on his

account with the First National Bank, and allowed to check against it. If Lee had checked against this credit in the usual course of his business, there would be no reason for holding the transaction fraudulent or without consideration, but he did not do so. On the same day he gave his check for the full amount of the credit, receiving therefor a certificate of deposit, payable, on presentation, properly indorsed, to William G. Thompson, to whom he was not indebted. It is said that this certificate was given to Maj. Thompson to settle the Linde & Co. claim; but Maj. Thompson does not say so, nor is there evidence to support the assertion. The Linde & Co. claim was in the hands of other attorneys for collection, and Maj. Thompson had nothing whatever to do with it. No reason was given to Maj. Thompson why the certificate was left with him, and no reason appears, other than that it was to hinder, delay, and defraud Linde & Co. in the collection of their claim. It will be observed that by this transaction all the visible property of Thomas Lee was covered, as against Linde & Co. By it, Thomas Lee though in debt and in need of money, leaves this two thousand dollars, upon which he was paying interest, idle in the hands of Maj. Thompson from May till January. In January the certificate is taken from its hiding place, where Linde & Co. could have pursued it, had they known the facts, and again covered, by being pledged as collateral to the three thousand five hundred dollar note. It cannot be doubted that by these unusual transactions Thomas Lee sought to cover up his property so as to hinder, delay, and defraud Linde & Co. in the collection of their debt against him. It is clear that Maj. Thompson did not know of, or share in, this purpose, in receiving and holding the certificate of deposit; but we think it is evident that Mr. Smyth did. He alone acted for his banks in all these dealings with Lee. He was thoroughly acquainted with Lee's circumstances and business; knew of the Linde & Co.

claim from the time the draft was protested, and of Lee's desire to avoid paying it. He conducted the transactions by which the two thousand dollar note and mortgages were given, the credit passed, and the certificate of deposit issued. It is denied that he knew of the certificate being left with Thompson. Thompson says, "I delivered it to Mr. Smyth at the request of Mr. Lee, and as it was directed when it was left with me." If it was directed to be delivered to Smyth at the time it was left with Thompson, it would seem that Smyth knew of its being left with that direction, and that

Thompson held it with the consent of both Lee and  
3      Smyth. As already stated, Mr. Smyth alone con-

ducted these transactions on behalf of his banks; and there can be no question but that the banks are bound by his acts in respect thereto, and his knowledge of Lee's purposes. It does not appear whether Lee's estate ever received any consideration for the two thousand dollar note or not. If the certificate was applied on the three thousand five hundred dollar note, then it may be said it has; otherwise, it has not. Whether consideration has been received for the two thousand dollar note or not, we are of the opinion that it, and the mortgages given to secure it, were executed and received with the intention of thereby hindering, delaying,  
and defrauding Linde & Co. in the collection of their

4      claim. There is some evidence of declarations made by Mr. Smyth, but, as they were not made when he was transacting the business, they are not considered. See *Bank v. Kellog*, 81 Iowa, 126.

V. The appellant bank insists that plaintiff had full knowledge of any fraud or want of consideration there may be in these mortgages before she filed her application for appointment, her inventory, and her petition for the sale of the property, wherein she admits their validity; that for these reasons, and the fact that she allowed the proceeds of the sale to be applied on the two thousand dollars, she is now



estopped from questioning the validity of the mortgages, or claiming the proceeds of the sale. Testimony was  
5 taken, under defendant's objection, tending to show that deceased told his mother that the mortgages were only for protection, and that he had not received a dollar on them; also that Mr. Smyth had said, the next day after the funeral, that the mortgages were made "to protect Tom against an unjust claim." We think appellant's objections were well taken to all this testimony, and therefore have not considered it in arriving at the conclusion already announced. If the deceased was living, he could not testify to the conclusions as stated to his mother; and as the statements said to have been made by Mr. Smyth were not made "touching matters of business which he is transacting when they are made, and which are in the scope of his authority," they were not competent on behalf of the plaintiff. See *Bank v. Kellog, supra*. What Mr. Smyth did say was not as a representative of the bank, but by way of advice to the mother of his friend, the deceased. We do not think that it should be said from this record that this aged woman, inexperienced in such business, did understand the character of these mortgages at the time the proceedings in probate were  
6 had. Concede, however, that she did; still, as in this action she stands as the representative of the estate and its creditors, the doctrine of estoppel should not be applied. True, she is the largest creditor; but, if she were the only one, we think, under the facts, she should not be held to be estopped from asserting fraud and want of consideration in these mortgages. It follows from these conclusions that the estate is entitled to recover from the Marion Savings Bank the amount it received from the sale of the mortgaged chattels. The decree and judgment of the district court are reversed as to Jay J. Smyth, and affirmed as to the Marion Savings Bank.—MODIFIED AND AFFIRMED.

## J. M. DORR v. L. S. CORY, Appellant.

Plaintiff conveyed lands in trust for a partnership and the trustee gave a mortgage back to the seller, then, the trustee made contract

1 with defendant to hold part of the land in trust for him in consideration of certain payments to be made by defendant. This contract took note of plaintiff's encumbrance, and while it

8 requires defendant to do certain things it does not provide that he shall have a conveyance when he performs them. After the trustee made this contract with defendant the partnership became

6 a corporation which took all the property of the partnership, including the contract of defendant. This transfer was made

7 subject to all rights of persons having a beneficial interest. The corporation obtained an extension of plaintiff's mortgage, giving

1 defendant's contract as collateral, and plaintiff finally brought suit to recover on his mortgage debt and on said contract as collateral. *Held:*

- a. The rights of the parties to a contract for the conveyance of an interest in land are not affected by a conveyance by the vendors of such contracts to their vendor as collateral security to obtain an extension of time of payment and the purchase price where such contracts were made subject to the encumbrances in favor of the original vendor and required the purchaser to pay his pro rata share of the costs of grading and improving the property but did not provide for a conveyance of the property contracted for when the required payments should have been made.

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- b. Since the corporation took conveyance impressed with a trust, binding on its grantor, the conveyance is no defense, on the ground that the partnership was unable to fulfill the contract.

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- c. Since the contract with the trustee contemplated possible changes in the trusteeship the transfer to the corporation subject to the contract did not affect the rights or liabilities of the contract holder.

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**Evidence:** LAND SALE: *Conspiracy.* In an action on contracts for the purchase of land alleged to have been fraudulently obtained, a letter written by one of the members of a partnership with whom the contract was subsequently made referring to negotiations with another person for the purchase of the land but expressing

2 the opinion that the latter's offer was not sufficiently favorable and suggesting that an attempt be made to interest defendant

108	725
111	279

108	725
114	185

108	725
116	478

108	725
118	191

108	725
130	550

108	725
136	228

108	725
137	427
137	658

in the matter, stating that if he was induced to come up the writer would stay by him to carry it the way he offered it to such other person and that if defendant came the writer would "fix him" is insufficient to show a conspiracy to defraud defendant where such other person had been received as a partner before the contracts were made with defendant.

**Sales: FALSE REPRESENTATIONS.** In an action for the price of land, where the evidence shows that defendant relied on his friendly relations with, and his confidence in, plaintiff, and believed his statements as to the value of the land, and the price which plaintiff had paid for it, and that such statements were false, it was error to direct a verdict for plaintiff.

*Appeal from Polk District Court.*—HON. T. F. STEVENSON, Judge.

WEDNESDAY, APRIL 5, 1899.

ACTION at law on contracts in writing for the purchase of interests in real estate. A jury was impaneled, but when the evidence was fully submitted a verdict in favor of the plaintiff for the sum of four thousand nine hundred and seventy-eight dollars and twenty cents was returned by direction of the court, and judgment was rendered on the verdict. The defendant appeals.—*Reversed.*

*Preston & Moffit, C. A. Bishop, and Lore Alford* for appellant.

*Dudley, Coffin & Byers* and *Chas. L. Powell* for appellee.

ROBINSON, C. J.—On the fourteenth day of January, 1890, the plaintiff, then being the owner of all the lots and blocks included in the plat of West End, an addition to the city of Des Moines, conveyed all of that property, excepting one block, to J. H. Snoke, as trustee for a partnership known as the West End Syndicate. The partnership was composed of A. W. C. Weeks, R. G. Scott, and J. N. Neiman; and the conveyance was made in fulfillment of prior contracts. To secure a part of the purchase price, Snoke, as trustee for the

partnership, made and delivered to the plaintiff notes to the amount of forty-seven thousand seven hundred and thirty-six dollars and eighty-four cents, and, to secure their payment, executed to the plaintiff a mortgage on the property he had conveyed. In February of the same year, Snoke,  
1 as trustee, entered into ten contracts in writing with the defendant, by each of which the trustee agreed to hold in trust for the defendant the undivided 1-150 part of the property which had been conveyed to the trustee, for the sum of one thousand dollars, of which a part was to be paid at the time the contracts were signed, and the remainder thereafter, in four equal annual installments, with interest thereon at the rate of six per cent. per annum. In July, 1890, the members of the partnership incorporated under the name previously used, and all the property of the firm, including the contracts with the defendant, became vested in the corporation. In the year 1893, interest on the notes made to the plaintiff by the trustee was due and unpaid, and, to secure an extension of time, the syndicate transferred to the plaintiff, to be held by him as collateral security, the contracts with the defendant. The petition alleges that there is due on the notes made to the plaintiff the sum of fifty-two thousand five hundred and eighty-eight dollars and forty-six cents and interest; that there is due on the contracts entered into by the defendant the sum of twelve thousand dollars. Judgment for that amount with interest and an attorney's fee, is demanded against him. The answer of the defendant pleads payment on the contracts to the aggregate amount of seven thousand nine hundred and fifty-seven dollars and six cents, and alleges that the contracts were obtained by fraud; that a large portion of the mortgaged property was sold, and the proceeds, which should have been used in paying the claims of the plaintiff, were appropriated by Weeks, Scott, and Neiman to their own use; that Weeks retired from the combination in the

year 1891, and in June, 1892, one Jakaway was elected secretary, and that he, Scott, and Neiman sold large portions of the mortgaged property, and collected large sums of money on the sales, all of which they fraudulently failed to pay on the claims of the plaintiff, and converted to their own use; that the plaintiff took the contracts in suit with knowledge of the fraudulent practices stated; that the consideration for the contracts has failed, by reason of the abandonment of the trust vested in Snoke, and the claims of the syndicate to own the mortgaged property. The answer further alleges that the plaintiff knowingly permitted Scott, Neiman, and Jakaway to sell a large portion of the mortgaged property, and fraudulently appropriate the proceeds thereof, to the amount of about twenty thousand dollars, to their own use, without making any payment on the mortgage debt, and that in consequence the plaintiff is estopped to claim anything on the contracts in suit, to the extent of the injury sustained by the defendant; that the mortgaged property is of the value of fifty-five thousand dollars, and plaintiff has commenced an action to foreclose his mortgage, and should not be permitted to maintain this action until he shall have exhausted the mortgaged property, and then only for a proportional share of the unsatisfied remainder for the payment of which the defendant shall be found liable. In an amendment to his answer the defendant avers that the transfer of the contracts to the plaintiff was unauthorized by the syndicate, and that the partnership is unable to carry out its agreement with the defendant to hold the interests for which the contracts provide in trust for him, by reason of a mortgage on the property, including those interests, for more than it is worth, in consequence of which the consideration for the contracts has failed. The verdict and judgment were for the amount apparently due on the contracts and unpaid.

I. The defendant offered in evidence a letter written by Scott to E. Jakaway & Boyd in June, 1888; but an

objection to it was sustained, and of that ruling the defendant complains. The letter referred to negotiations  
2 with Neiman, but expressed the opinion of the writer that his offer was not sufficiently favorable, and suggested that an attempt be made to interest the defendant in the matter. It is stated that, if the defendant was induced to come up, "we will stay right by him here, and get him to carry it in the way we offered it to Neiman;" also, "Get your man here, and we will fix him." We understand the matter referred to in the letter was the purchase from the plaintiff of the land which was subsequently platted as West End addition, a contract for which, entered into by Weeks and Scott with the plaintiff, was then outstanding. It is urged that the letter tends to sustain the claim of the defendant that a conspiracy to defraud him was entered into by the members of the West End Syndicate, and that what was done was in pursuance of that conspiracy. We do not think the letter tends to sustain that claim. We have quoted but a small part of it, but, taken as a whole, the letter shows that the writer believed the proposed venture would be a profitable one for the defendant and the others concerned, and that the terms on which Neiman offered to take an interest were regarded as exorbitant. The letter had no relation to the conditions which existed when Cory entered into the contracts in suit. Neiman had then been received as a partner in the syndicate, and the transaction with the defendant was not the one proposed in the letter. We conclude that the letter was properly excluded.

II. The agreed price for which the plaintiff sold the land in question to the syndicate was about fifty thousand dollars. The defendant went onto the land with Scott before purchasing, and testified in regard to what was done, and  
3 the conversation between them, as follows: "He showed me around. He said it cost eight hundred dollars an acre, and it was a one hundred and twenty-acre tract. I said that would make ninety-six thousand dol-

lars. He said: 'Yes; but we propose syndicating it for \$100,000, and we are going to plat it in lots.' I remarked I did not think I should want to pay over \$400 an acre for it. He said I would have to be educated to prices of land in Des Moines, and I said: 'I expected; probably might have made a wild guess on that, but did not exactly know how that would be.' He then cited me to a piece of land west of it held at one thousand dollars an acre, a tract east at one thousand five hundred dollars an acre, and the lots to the north were selling for three hundred dollars to five hundred dollars per lot. He said the indebtedness back was forty-seven thousand dollars, and the rest of the ninety-six thousand dollars had been paid. He said: 'We expect to make fifty one thousand dollar time contracts, and the rest we will keep for what we have put in on this; we would keep them for the money we had already put in, and the rest would buy those time contracts.' He stated to me that after it was in shape for sale the lots would range from \$150 to \$1,000, and would be reasonably worth \$350 on an average. He went on to state that there would be 800 lots at \$300, which would make \$240,000, and he thought we would get more than that out of it. \* \* \* I took five contracts with him. \* \* \* He said that, on account of our friendly relations, he would let me have these shares, and would let myself and one other gentleman (Calvin) in on the ground floor. Said we were to have shares cheaper,—for less money. I was to send him \$1,000 for five contracts. I was to get them at \$800 apiece by sending up my \$1,000. At this time, and at the time of executing the contracts, I believed what Mr. Scott said to me. I had known Mr. Scott for some years, and had confidence in him." The five contracts referred to were taken, but at a later time in the same year Scott told the defendant that the valuation of the property had been increased fifty thousand dollars, and proposed that he take five additional shares. The defendant consented to do so, and the five contracts were surrendered and

the ones in suit were entered into. Credit for two thousand five hundred dollars was given him on account of the increased valuation of the property. The larger part of what Scott said to the defendant to induce him to take the first five contracts was in the nature of expressions of opinion or purpose. The statement respecting the debt for which the land was held was substantially true. The only state-

4       ment purporting to be of fact which is shown to have been false is that relating to the cost of the land.

Would that statement have authorized the jury to find for the defendant? It was said in *Hemmer v. Cooper*, 8 Allen, 334, that "the representations of a vendor of real estate, to the vendee, as to the price he paid for it, are to be regarded in the same light as representations respecting its value. A purchaser ought not to rely upon them; for it is settled that even when they are false, and uttered with a view to deceive, they furnish no ground of action." That rule was followed in *Cooper v. Lovering*, 106 Mass. 77, and it is the rule of *Tuck v. Downing*, 76 Ill. 71, and *Banta v. Palmer*, 47 Ill. 99. In *Holbrook v. Connor*, 60 Me. 578, it was said: "The statement of the vendor that he paid a certain price for the land, if true, can be no more than an indication of his opinion of its value; and when we consider the various motives which may, and often do, actuate men in making their purchases, and especially when it is done for speculation, it is but the slightest proof of such opinion." As a general rule, a vendee has no right to rely upon the statements of the vendor respecting the value of the property sold, but must act upon his own judgment, or seek information for himself. But to that rule there are exceptions. It was said in *Simar v. Canaday*, 53 N. Y. 306, that, where statements as to value are mere matters of opinion and belief, no liability is created by uttering them, but that such statements "may be, under certain circumstances, affirmations of fact. When known to the utterer to be untrue, if made with the intention of misleading the vendee, if he does rely upon them, and is



misled to his injury, they avoid the contract." The fraud which vitiates a contract must be material, affecting the very essence of the contract; but ordinarily, "if the fraud be such that, had it not been practiced, the contract would not have been made, then it is material to it." 2 Parsons Contract, 770. See, also, 2 Pomeroy Equity Jurisprudence, section 878, and notes. That rule was applied in *Smith v. Countryman*, 30 N. Y. 656, which was an action upon a contract for the sale of hops. It was held that a false representation made by the vendee as to the price at which he had purchased hops of another person, which was relied upon by the vendor, and induced him to enter into the contract of sale, was material, and constituted a defense to an action on the contract. This rule appears to us to be in harmony with reason and the principles of justice. The price at which property actually sells in the open market is very satisfactory evidence of its value at the time of the sale. We cannot assent to the proposition that the statement of a vendor that he paid a specified price for the property he sells is a mere expression of opinion, upon which the purchaser has no right to rely. On the contrary, we think it is a statement of fact; and if the purchaser, without knowing or having reason to know what price was paid, relies upon the false statement, to his injury, he is entitled to relief. The cases of *Teachout v. Van Hoesen*, 76 Iowa, 113; *Iler v. Griswold*, 83 Iowa, 442, and *Coles v. Kennedy*, 81 Iowa, 360, although not precisely in point, tend to sustain our conclusion. See *French v. Ryan*, 104 Mich. 625 (62 N. W. Rep. 1016); *Moon v. McKinstry*, 107 Mich. 668 (65 N. W. Rep. 546), and *Woolen Co. v. Smalley*, 111 Mich. 321 (69 N. W. Rep. 722).

5 In this case no confidential relations existed between the defendant and Scott, but they had been acquainted with each other for several years; and, if the testimony of the defendant be true, Scott took advantage of their acquaintance and friendly relations, and the confidence which the defendant had in him, to accomplish the sale.

The land had been purchased but a short time before, and, if the defendant believed that the price paid for it was ninety-six thousand dollars, his belief would naturally have had great influence in causing him to make the purchase. Therefore, whether Scott made the statement respecting the price paid which is attributed to him, and, if he did, the probable weight it had in effecting the sale, were questions for the determination of the jury, and the court erred in directing a verdict for the plaintiff.

III. It is insisted that the conveyance by the partnership to the corporation of the property in which the contracts purported to give the defendant an interest has made it impossible for the partnership to meet the requirements of the contracts; hence, that there is a failure of  
6 consideration. Each of the contracts provides that the trustee and his successors are to hold the land in trust for the benefit and use of all persons having a beneficial interest therein. The syndicate acquired the title impressed with that trust, and the contracts gave to the plaintiff notice of it. The defendant has not lost any right by the transfer, and the consideration of the contracts has not failed in consequence of it.

IV. It is contended that the transfer of the property in question was in violation of the trust imposed by the contracts in suit, was without consideration, and is void. The contracts contemplated a possible change in the trusteeship; the plan of having title to the land conveyed to and by a trustee was adopted by the partnership as a convenient method of transacting its business; and the incorporation of the syndicate, and the transfer of the property to it, did not  
7 in any manner affect the rights of the defendant under his contracts. They provided that the trustee might execute conveyances of the property in behalf of his beneficiaries, on the order of the board of directors. We do not find that any provision of the contracts has been

violated by the transfers made, and the interests of the parties and objects sought to be accomplished furnished a sufficient consideration.

V. It is claimed that the plaintiff should not be permitted to maintain this action, for the reason that it is in the nature of an action for the specific performance of the contracts, and the plaintiff does not show that he is ready and able to perform what the contracts require of the trustee. The rights of the defendant were acquired subject to the incumbrance on the property in favor of the plaintiff.

8 The contracts refer to that incumbrance. They require the defendant to pay his pro rata share of the cost of grading and improving the property to which they refer, and contain other provisions, but do not provide for a conveyance of the property contracted for, when the required payments shall have been made. The record fails to show any valid objection to the transfer of the contracts to the plaintiff, or to a recovery by him of the amount due thereon in this action. Much is said in argument in regard to the mutual, reciprocal, and dependent provisions of the contracts, and the right of the defendant to insist upon the performance of them; but the appellant has failed to call our attention to any requirement which should be performed by the plaintiff as a consideration precedent to his right to recover. What is said on that point is couched in vague and general terms. The contracts are in some respects peculiar and unusual, but we do not think their meaning and effect, so far as they are involved in this case, are doubtful. That the contracts were entered into is not denied, and there is no dispute in regard to the payments which have been made on them. For the error pointed out, the judgment of the district court is REVERSED.

## STATE OF IOWA V. EUGENE REILLY, Appellant.

**Liquors: ILLEGAL TRANSPORTATION:** *Statute construed.* Under a statute prohibiting "any common carrier or person" from transporting liquor, an individual engaged in the liquor traffic may be convicted, though not a common carrier.

**Indictment: SUFFICIENCY.** An indictment for unlawfully transporting intoxicating liquors within the state, in the language of the statute which describes the offense, is sufficient.

**Information: AMENDMENT.** An information before a justice of the peace may be amended, by substitution, in the district court on appeal.

**Appeal: MISCONDUCT OF JURORS.** A conviction of unlawfully transporting intoxicating liquors within the state will not be disturbed on appeal on the ground of misconduct of certain jurors in drinking the contents of one of the bottles of beer transported by defendant, after the verdict was found, reduced to writing and signed by the foreman.

*Appeal from Winnebago District Court.*—HON. J. F. CLYDE, Judge.

WEDNESDAY, APRIL 5, 1899.

THE defendant was accused by information of the crime of unlawfully transporting intoxicating liquors within the state. There was a trial by jury, verdict and judgment of guilty, and defendant appeals.—*Affirmed.*

*H. A. Brown* for appellant.

*Milton Remley*, Attorney General, and *W. H. Redmond* for the state.

**WATERMAN, J.**—There was a trial before the justice of the peace with whom the information was filed, and the defendant was found guilty. He appealed to the district

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court. In that tribunal he withdrew his plea, and demurred to the indictment. The first ground of the demurrer was that the information charged more than one offense, and upon this it was sustained. Thereupon the state  
1 amended the information by making a charge in the language of the first paragraph of section 2421 of the Code. A motion to strike this amendment, and a demurrer thereto, were overruled.

The first ground of complaint is that the amendment to the information was permitted. If the different offenses had been described separately in the original information, so that the state could have dismissed all save one, we think it will not be claimed that such action could not properly have been taken. *State v. Buck*, 59 Iowa, 382. It is the established rule in this state that an amendment to an information is permissible, and that it may be made in the district court. *State v. Merchant*, 38 Iowa, 375; *State v. Doe*, 50 Iowa, 541. We know of no good reason why this may not be done by a substituted instrument, as was here the case. In *State v. Butcher*, 79 Iowa, 110, the amendment was attempted after the verdict. The other decisions cited by appellant on this branch of the case are not in point.

II. It is thought the amended information charged no crime. As we have said, it is in the language of the statute, and that is sufficient where, as here, the statute describes the offense. *State v. Bauguess*, 106 Iowa,  
2 107. If it can be said, as claimed, that by implication, under this section, it must be shown, in order to convict, that the liquor belonged to some third person, this would pertain to the proof, but not to the charge, which is sufficient if it follows the words of the law.

III. In different forms the question of the sufficiency of the evidence was raised. We have only to say that the case against defendant seems to have been fully made. It is urged by appellant that the statute is meant to punish

only a common carrier, or other like person, and that defendant is not shown to be within this description. The wording of the statute is, "It shall be unlawful for any common carrier or other person," etc. That an individual engaged in this illegal traffic, if not a common carrier, falls within the designation of "other person," seems too clear for discussion.

IV. Finally, the misconduct of the jury is made ground of complaint. It seems that two bottles of beer, which were used in evidence, were taken to the jury room when the jury retired to deliberate upon their verdict. The contents of one of these bottles was consumed by two members of the jury. But the court was warranted in finding from the testimony offered on this point that the liquor was drunk after the verdict was found, reduced to writing, and signed by the foreman. Where, during the progress of a trial, but before final submission of the case, a juror indulges in the use of intoxicating liquor, we have held that the verdict should not be disturbed unless prejudice is shown; that the fact alone that the liquor was taken is not enough to vitiate the verdict. *Hemmi v. Railway Co.*, 102 Iowa, 25, and other cases cited. On the other hand, the rule is established that prejudice will be presumed if the liquor is drunk after the jury has retired to consider the case. *State v. Baldy*, 17 Iowa, 39; *Berry v. Berry*, 31 Iowa, 415. The ground of this holding, as stated in the first of these cases, is that "the parties have a clear right to the cool, dispassionate, and unbiased judgment of each juror." The court was justified in finding in the case at bar that defendant had his right in this respect. If the liquor was taken after the jury had reached a conclusion and put the verdict in form, we know of no reason why defendant should complain. It appears, in such case, affirmatively, that he is in no way prejudiced. Some other matters are discussed, but we think they are covered by what we have said.

—AFFIRMED.

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THE STATE OF IOWA V. THOMAS SEEVERS, Appellant.

**Bastards: EVIDENCE: *Impeachment.*** In an action for the support of a bastard, the general reputation of the prosecutrix as to  
 1 chastity may be shown, as affecting her credibility; but particular unchaste acts cannot be proved, unless they occurred at  
 2 or near the time the child was begotten.

**RELEVANCY.** In an action for the support of a bastard, it was not error to permit the prosecutrix to prove that soon after the child  
 3 was born she was arrested for attempting to poison a witness for defendant, where there was evidence tending to show that the prosecution was instituted by defendant to influence the bastardy proceeding which was then pending.

**HARMLESS ERROR.** Where a mother of a bastard claimed she was seduced under promise of marriage, it was not prejudicial error  
 4 to permit her to testify that she was divorced from her former husband, and that he had married again, though it was immaterial to defendant's liability for the support of the bastard.

**SAME.** Error if any in admitting evidence that the prosecutrix in bastardy proceedings had been divorced from her husband and  
 4 that he had married another woman, is not prejudicial to defendant, where the uncontradicted evidence showed that she had never met her husband for several years before the children in question were begotten.

**CURING ERROR.** Error in permitting the prosecutrix to testify that she was without money to support her bastard child was cured  
 5 by an instruction withdrawing the evidence, and directing the jury not to consider it.

**INSTRUCTIONS: *Request.*** No special reference need be made, in the absence of a request therefor, to testimony offered by defendant in bastardy proceedings that at the time conception took place  
 6 he was suffering from an injury rendering him physically unable to have sexual intercourse, where such testimony was not referred to in the pleadings.

**New Trial: DISCRETION: *Newly discovered evidence.*** Refusal of a new trial of bastardy proceedings for newly discovered evidence that the husband of the prosecutrix had sexual intercourse with her  
 7 at about the time the children in question were begotten at a hotel in the southern part of the city, is not an abuse of discretion where the husband alone makes affidavit in regard thereto, his statements are in many respects unreasonable and improbable

and are contradicted by the proprietors of all the hotels in that part of the city and by the testimony of prosecutrix.

**Appeal: REVIEW OF VERDICT.** In an action for support of a bastard, the witnesses for the prosecutrix, many of whom were of good character, testified that she was a woman of good repute. Witnesses for defendant, the most important of which were persons of bad character, testified that prosecutrix was a prostitute, and that she stated that she did not know that defendant was the father of her child. *Held*, that a verdict for the prosecutrix should not be reversed as contrary to the evidence.

*Appeal from Mahaska District Court.*—HON. BEN MCCOY, Judge.

THURSDAY, APRIL 6, 1899.

ACTION at law to recover of the defendant support for bastard children. There was a trial by jury, and a verdict and judgment against the defendant, from which he appeals.—*Affirmed*.

*Seevers & Bryan* for appellant.

*Dan Davis, C. C. Orvis, B. W. Preston, and James Carroll* for the state.

ROBINSON, C. J.—On the 14th day of May, 1896, Mrs. Mary E. Brooks gave birth to two children. She alleges that they are illegitimate, and that the defendant is their father. This action was brought to require him to provide for their support. Mrs. Brooks was thirty-four years old at the time of trial. She was born in Keokuk county, and resided there until she was about nineteen years of age. Three or four years of that time she lived in Sigourney. She left Keokuk county early in the year 1882, and, as we understand the record, went to Villisca, and was married, in the western part of the state, in August of the same year, to W. R. Brooks. They lived together as husband and wife at different times for about four years, when they finally separated. It appears that Mrs. Brooks went back to Sigourney, and again resided there, but the length of her



second residence is not shown. She returned to the western part of the state in the year 1887, and made her home at Villisca and Creston—nearly all of the time at the place last named—for a period of seven or eight years. In December of the year 1894 she went to Oskaloosa. On the 29th day of that month she was employed by the defendant as a housekeeper or servant, and she remained in his employment until the 7th day of November, 1895. His wife had died in April, 1894; and, during the time Mrs. Brooks was in his service, the members of his household were himself, his mother, who was eighty-five years of age, and Mrs. Brooks. The latter claims that three or four weeks after she went to his home he began to pay her special attention, and asked the privilege of visiting her in her room, and that in February, 1895, under promise of marriage, she submitted to sexual intercourse with him, and that after that time, during the remainder of her stay in the house, they had sexual intercourse once or twice each week. He denies that he ever paid Mrs. Brooks any attention, denies the alleged promise of marriage, and denies that he ever had sexual intercourse with her. The jury found the defendant guilty, and the judgment of the court required him to pay one hundred dollars annually for each child until it should reach the age of twelve years, or a gross sum of two thousand, one hundred dollars, less any payments made, if paid before May 14, 1900.

I. The defendant offered evidence which tended to show that Mrs. Brooks had been a prostitute for many years before he met her, that she had been an inmate of houses of ill fame in different towns, and that she was a woman of bad moral character. It is not claimed that the facts which such evidence tended to prove would be a defense in this action, but that they may properly be considered as affecting the credibility of the prosecutrix as a witness. It is insisted that the district court erroneously refused to admit evidence respecting

her reputation at Sigourney, and in regard to particular acts of prostitution. The appellant has failed to point out in the record the rulings thus questioned. We have searched it, however, and find that he was permitted to offer evidence which tended to show that the reputation of the prosecutrix, as to her moral character, while she resided in Sigourney, was bad, and that he was permitted to show that a house in that town in which she lived was reputed to be a house of ill fame, and that an information charging her and the woman with whom she lived with keeping a house of ill fame was filed with the mayor in February, 1887, but that the persons accused left town, and the prosecution was continued. We also find that the court refused to admit some evidence which was offered to show the reputation of the house in Sigourney in which the prosecutrix lived, the character of the house, the purpose for which it was kept, and the reputation of the woman who kept it. Evidence to show that the prosecutrix used profane and obscene language was also rejected. Section 3649 of the Code of 1873, which was in force when the rulings in question were made, provided that "the general moral character of a witness may be proved for the purpose of testing his credibility." Under that provision the general moral character of a witness, or his general reputation as to morals, not his character or life as known to the impeaching witness, may be shown. *State v. Egan*, 59 Iowa, 636. But proof of specific acts of vice is incompetent. *Kilburn v. Mullen*, 22 Iowa, 498; *State v. Sterrett*, 71 Iowa, 386; *State v. McGee*, 81 Iowa, 17. It has been held in this class of cases that evidence of improper relations between the prosecutrix and a man not the defendant is immaterial, unless it be shown that such relations might have existed at the time the child in dispute was conceived. *State v. Johnson*, 89 Iowa, 1; *State v. Granger*, 87 Iowa, 355; *Olson v. Peterson*, 33 Neb. 358 (50 N. W. Rep. 155.) The case upon which the appellant relies as authorizing proof of particular acts of unchastity are not applicable to

the facts in this case. The evidence held in *State v. Read*, 45 Iowa, 469, to have been admissible, tended to show that a person other than the defendant might have been the father of the child there in question. In *State v. Karver*, 65 Iowa, 53, the evidence held to be material tended to show a motive on the part of the prosecutrix for giving false testimony, and unchaste conduct with a man other than the defendant at about the time of conception. In *State v. Woodworth*, 65 Iowa, 141, it appeared that the prosecutrix had given birth at different times to two illegitimate children, and that the defendant could have been the father of but one of them; and it was held proper to inquire as to the father of the first child, if his intimacy with the prosecutrix continued until the second child was begotten. In the case of *State v. Borie*, 79 Iowa, 605, it appeared that the prosecuting witness was with one Damon at about the time the child in question was conceived, under such circumstances that they might have had sexual intercourse. It was held that evidence was material to show that seven or eight years before that time, when she was engaged to be married to Damon, they were locked in a room in an hotel together for several hours, for the reason that, if they were so locked in a room for an improper purpose, an inference of wrongful intercourse between them at about the time conception occurred might be drawn. See *People v. Keefer*, 103 Mich. 83 (61 N. W. Rep. 338); *Ramey v. State*, 127 Ind. Sup.

243 (26 N. E. Rep. 818). Some evidence tends to show that the prosecutrix sustained improper relations with one George Henry Smith while she was at Sigourney, and that he visited her in Oskaloosa, but our attention is not called to any evidence which shows that he was with her at or near the time when the children in controversy were begotten. After a careful examination of the objections presented on this branch of the case, we reach the conclusion that they are not well founded. The rulings of the court on the admission of the testimony considered were, on the whole, favorable to the defendant.

II. The state was permitted to prove that, a few weeks after the children in question were born, the prosecutrix was arrested on the charge of having attempted to poison a witness for the defendant named Roberts; and of  
3 that the defendant complains. There was evidence from which the jury may properly have inferred that the prosecution was instituted and carried on by the defendant for the purpose of influencing the determination of this cause, which was then pending, and to that extent preventing a trial on the merits. If that was true, the fact was a proper one for the consideration of the jury.

III. The prosecutrix was permitted to testify that she was divorced from her husband, and that he had married another woman, and to introduce in evidence what purports to be a certified copy of the license issued for that marriage.  
4 It is claimed by the defendant that it was not only material, but of the utmost importance, to the prosecutrix, to show that she had been divorced and therefore was competent to enter into a valid contract of marriage, in order to show that she may have been seduced under promise of marriage, and to rebut the presumption, which must otherwise arise, that her husband was the father of her children. Whether the prosecutrix was seduced, or whether she had been divorced, as claimed by her, were not important issues in the case. Had her claims been false in both particulars, that fact would not have availed as a defense in this action. If the defendant is the father of her children, he is liable in this action, even though she was the lawful wife of another at the time the children were conceived, and knew the fact. *State v. Lavin*, 80 Iowa, 555. The evidence received during the trial shows, without contradiction, that the prosecutrix had not met her husband for several years before her children were begotten. Therefore it was immaterial whether she had been divorced, and the evidence given on that question could not have been prejudicial. It tended to show, however, that she believed she was divorced and

free to marry again at the time of the alleged seduction; and her belief, rather than the fact, was what influenced her at that time, if her claim in regard to what occurred be true. We conclude that there could have been no prejudicial error in admitting the evidence under consideration, and whether there was in fact error in admitting it we do not determine.

IV. The prosecutrix was permitted to testify that she was without money or other property with which to support her children. That was erroneous. *State v. Lavin*, 5 80 Iowa, 555. However, the court afterwards, and during the trial, withdrew that evidence from the jury, and in the charge directed the jury not to give it any consideration; and the error was thus cured.

V. Complaint is made of several paragraphs of the charge to the jury. The third was not well drawn, and is not to be commended, but nothing it contains could have prejudiced the defendant. Its probable effect was favorable to him. The fifth paragraph was not erroneous. Other paragraphs are criticised, but we think without sufficient reason. The charge as a whole was fair to the defendant, and, although in some parts there are indications of haste or lack of care, they do not, so far as called to our attention, contain anything of a nature to prejudice the defendant.

VI. Testimony was offered on the part of the defendant which tended to show that, in attempting to mount a bicycle in the summer of 1895, he received such an injury that he was physically unable to have had sexual intercourse at the time the children in question were begotten. 6 The district court did not, in its charge, call the attention of the jury to that claim, and the appellant contends that the omission was an error. We do not find that any instruction in regard to the matter was asked, it was not referred to in the pleadings, and we do not think the court erred in not making special reference to it in the charge.

VII. After the verdict was returned, the defendant filed a motion for a new trial, which was overruled. It was based in part upon alleged newly-discovered evidence set out in an affidavit made by W. R. Brooks. In that he states that he is the husband of the prosecutrix; that after their marriage, at a time not stated, he moved to Leavenworth, where she joined him, but that she was in poor health, and her condition was such that they could not cohabit together, and she returned to Villisca; that on account of her infidelity he concluded not to return to Villisca, but, after repeated promises by her to reform, he went to Villisca and lived with her: that there were other separations and other condonations until about the year 1892, when he went in search of a location, but learned that she had resumed her old habits; that since that time he had met her occasionally; that in the latter part of July or in the first part of August, 1895, he met her at a hotel in the southern part of Oskaloosa, where he was stopping, and that she occupied a room with him as his wife; that he afterwards learned that she was in distress, and again visited Oskaloosa to assist her; that her attorneys told him he could not be permitted to see her, and, to obtain an affidavit from him to the effect that he had been divorced from her, threatened to prosecute him for adultery, and requested him to go where he could not be found; that he did not at that time see his wife, but signed a paper to the effect that he had been divorced from her, and that he did so in order to help her, at the same time saying the affidavit was not true, and refusing to swear to it; and that he then went to the state of Kansas, where he remained until after the trial. The affidavit of the defendant, tending to show lack of knowledge on his part of what Brooks would testify to, and diligence to ascertain it, and other affidavits tending to show that Brooks was seen in Oskaloosa about the middle of August, 1895, and that he was not in that city, but in the state of Kansas, during the trial of the cause, were also filed in support of

the motion. In resistance, the plaintiff filed the affidavit of Brooks, made in September, 1896, to the effect that he was divorced from the prosecutrix in March, 1887, and married another woman in August of the same year; that the prosecutrix was an unmarried woman, and had always been chaste and of good character; and that he made the statement voluntarily, and had no interest in her case, other than to see justice done. Several persons testified that they saw Brooks in Oskaloosa during the trial. The attorneys referred to in his affidavit deny his statements respecting them, and say that he made claims at variance with those contained in his second affidavit. The proprietors of the only hotels in the southern part of the city state that the prosecutrix did not stop at their houses at the time stated by Brooks in his affidavit. Numerous other affidavits were filed, but we would not be justified in referring to them at length. The matter of chief importance, on which the motion for a new trial was based, is the alleged visit of Brooks to Oskaloosa, and the meeting with the prosecutrix, at about the time the children in question were begotten. The only evidence that he met his wife as claimed is contained in his second affidavit. That is contradicted, in effect, by his first one, by the proprietors of the hotels in the part of the city where he says he met his wife, and by her testimony as a witness. His statements are in many respects unreasonable and improbable. We do not think an abuse by the district court of the discretion with which it was vested in refusing a new trial has been shown.

VIII. This case was closely contested in the district court. Many witnesses were examined on each side, and much of the testimony is in such irreconcilable conflict and of such a character as to make it certain that a large part of the testimony was wilfully false. If the witnesses for the prosecutrix are to be believed, she is a woman of good **repute** excepting her relations with the defendant. Many witnesses testify to that effect, and among them are

persons of excellent character, who knew of her daily life in Creston for years. If the testimony for the  
8 defendant be credible, she has lived the life of a prostitute from the time she was married, and has stated to different persons that the defendant was not, or that she did not know that he was, the father of her children. It is to be said in this connection that a considerable number of the most important witnesses for the defendant are admittedly people of vile habits and bad character, whose testimony might well be doubted. In view of the conflict in the evidence, it cannot be said that the verdict is not supported by the evidence. We have given to this case much consideration, but fail to discover any ground upon which a reversal of the judgment of the district court would be authorized, and it is therefore  
AFFIRMED.



108 748  
1140 217JOHN KING v. THE CHICAGO & NORTHWESTERN RAILWAY  
COMPANY, Appellant.

NEGLIGENCE: JURY QUESTION: EVIDENCE. Whether an employe, loading ties on a car by drawing them in with a pick, saw or ought to have seen a hole in the car floor, through which he stepped a few minutes after he entered the car, is for the jury, notwithstanding testimony that it was in plain sight; he having testified that, though he looked, he did not see or know of it, and that there was snow and straw, over and around it.

The fact of the wood about the hole in a car floor, through which an employe of the railroad company stepped, being rotten, is sufficient to charge it with notice thereof.

*Appeal from Clinton District Court.*—HON. P. B. WOLFE,  
Judge.

SATURDAY, APRIL 8, 1899.

*Hubbard, Dawley & Wheeler* for appellant.

*T. W. Hall* for appellee.

PER CURIAM. Ties were being loaded on a car by first placing them on a dolly, on which they were carried to the door. The plaintiff, with a pick, threw them in, and they were then properly placed by two others. While doing this, he stepped into a hole in the car floor, about six inches wide and ten inches long, fourteen inches from the door jamb, and five or six inches from the south wall, and sustained injury. According to his testimony, there were snow and straw on the floor and a number of pieces of bark about the hole when he pulled his leg out, and, though he looked, he did not see or know of the hole until he stepped into it. Other witnesses say the hole was in plain sight and had been mentioned on the car. He entered the car at 3:30 P. M. of February 10th, and the accident occurred about twenty minutes later. The plaintiff was directed to do this work, and, in the absence of knowledge, had the right to assume the floor to be in a safe

condition. In view of his statements with reference to straw on the floor, bark about the hole, and the character of his work, we think the question of whether it was seen by plaintiff, or might have been seen by the exercise of ordinary care, was for the jury to determine. If the bark was about or over the hole it might not have been so obvious as to preclude the conclusion that he saw it, or ought to have seen it. To the contention that defendant cannot be charged with notice of its existence, it may be said that, even if this was essential to recovery, there was evidence tending to show that the wood about the hole was in a decayed condition. While we might not have reached the same conclusion as did the jury, we are not at liberty to disturb their verdict. The judgment against the defendant is **AFFIRMED**.

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SHERZER AND COMPANY. Appellant, v. D. BUCKHOLZ AND.  
MRS BUCKHOLZ.

CONTRACT: PERFORMANCE. Where plaintiff contracted to build a well and to secure a supply of water, or to receive no pay, and no water was secured, and the well was bored so crookedly that a pump could not have been placed therein, he cannot recover on the contract.

*Appeal from Osceola District Court.*—HON. F. R. GAYNOR,  
Judge.

SATURDAY, APRIL 8, 1899.

ACTION in equity to establish a mechanic's lien, and for judgment and decree foreclosing the same, under a contract for digging a well for the defendant D. Buckholz. Issues were joined, and, on trial had, judgment was entered dismissing plaintiffs' petition, from which they appeal.—*Affirmed*.

*W. P. Briggs* for appellants.

*Boies & Roth* for appellees.

GIVEN, J.—Plaintiffs and defendant Buckholz entered into a verbal contract by which the plaintiffs were to dig a

well on defendant's premises, in pursuance of which plaintiffs set their machinery and sank the well to a depth of from one hundred and forty to one hundred and sixty-five feet. The material dispute is as to what the contract was. Plaintiffs claim that they were to have forty cents a foot for the first forty feet, and that, failing to get water at that depth, it was agreed that they should have ten cents per foot additional for the next ten feet, and ten cents additional for every ten feet thereafter; defendants to furnish, and they to put in, the curbing. The defendants concede that the contract was, as to price, as claimed, and claim that the plaintiffs were to get a supply of water or no pay. Defendants also alleged that the well that was bored was so crooked that a pump could not be placed therein. Defendants set up a counterclaim for boarding the plaintiff and their hands and horses during the time they were boring the well, but as nothing was allowed them on this counterclaim, and they have not appealed, it is not before us for consideration. We will not set out the evidence. It is sufficient to say that we think it sustains the claim of the defendants that the plaintiffs were to secure a supply of water, or to receive no pay, and that they failed to secure the supply of water. It is also shown that the well was bored so crookedly that a pump could not have been placed therein, even if a supply of water had been secured. We think the plaintiffs failed to establish their right to a judgment and that their petition was properly dismissed.—AFFIRMED.

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TO

AGENCY

ABBREVIATIONS—See EVID., <sup>30</sup>.

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1. **Claimed Agency—Evidence**—Where the stockholders of a creamery company sold their stock either to S, or to the company, receipts given by stockholders, who did not surrender their certificates at the time, running to defendant, and not to S., and the statement by a person, who acted either for defendant or S in the transfer, that he acted as agent for defendant, were admissible to show whether such agent claimed to act for S. or defendant.—White v. Elgin Creamery Co., 522.
2. **Double Agency**—An agent who acts for two principals is required to exercise the utmost good faith to each, and, if he cannot do so, he should at once end the agency.—Morey v. Laird, 670.
3. **Liability of Agent**—Since there is no implied warranty by an agent that his principal has authority to contract, an officer or agent of a national bank, acting within the scope of his authority, cannot be held personally liable upon a contract of guaranty made on behalf of the bank, but which is in excess of the power of the bank to make.—Thilmany v. Iowa Paper Bag Co., 357.
4. **SAME**—The taking of the individual note of the representative of a corporation in settlement for services rendered in the business of the corporation, is not conclusive evidence that it was accepted in payment of the claim or that the person rendering the services did not have a claim against the corporation therefor.—Kruse v. Seiffert & W. Lumber Co., 353.

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## AGENCY Continued

5. *Same*—That the memoranda of accounts made by plaintiff in an action against a corporation for services rendered in connection with its business did not show an account with it, but with its agent, whom it claims had undertaken to carry on the business and to pay for all services, is but *prima facie* evidence that the plaintiff relied on the agent's responsibility.—*Idem*.
6. *Same*—The payment by the master to the agent of the money for the servant's wages will not relieve him from liability to the servant, where the agent does not make the payment, and the servant is not informed of the arrangement before he renders services.—*Idem*.
7. *Jury Question*—A company carried on business through a general agent, allowing him a specific sum monthly for the payment of help, for whose wages he alone was to be responsible. A person employed by the agent in the business, repeatedly stated that he was working for the agent, and, when the latter was discovered to be a defaulter, said he had lost all his wages. In an account of the wages due him, he charged them to the agent, and, after the latter's defalcation, took his note for the amount. Letters written by him to the agent indicated that he looked to him alone for pay. Not being dependent on his wages, he paid little attention to collecting them, and testified that, in taking the agent's note, he did not intend to discharge the company. *Held*, that a finding that the services had been performed for the company, and not for its agent individually, was warranted.—*Idem*.
8. *President—Authority of*—Where the president of a corporation owning a majority of the stock acquired the stock of a creamery company, which he testified was for the ultimate benefit of the corporation, and an agent of the corporation, authorized to lease creameries, made an agreement with the patrons of the creamery purchased, an instruction, in an action against the company on such agreement, that if the president authorized the agent to make it, or if the president, as such, subsequently ratified it, he would be presumed to be authorized to confer such authority, or ratify the agent's act, was not erroneous—*White v. Elgin Creamery Co*, 522.
9. *Presumptions*—The president of a corporation will be presumed to have authority to act for it in all matters within the ordinary course of its business.—*Idem*.
10. *Ratification*—Where the agent of a creamery company on taking charge of the creamery posted notices signed by the com-

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pany, and one of its directors superintended the operation of the creamery, and daily reports were sent to the company on blanks furnished by it, and all butter shipments, with two exceptions, were made by the company as consignor to itself as consignee, and checks for the payment of its patrons who delivered milk on the faith of a proposition made by such agent were expressed by it to its servant at the creamery, such facts warranted a finding that the company operated the creamery, and hence ratified such proposition, though the same, when made, was not within the agent's authority.—*Idem*.

ALTERATIONS—See NOTES AND BILLS, <sup>1</sup>.

APPEAL—See BENEFIT ASSOC., <sup>2</sup>; ELECTIONS, <sup>1</sup>, <sup>2</sup>; INTOX. LIQ., <sup>1</sup>; SURETIES, <sup>1</sup>.

1. **Abstracts**—See <sup>2</sup>, <sup>3</sup>, <sup>4</sup>, <sup>5</sup>, <sup>6</sup>, <sup>7</sup>, <sup>25</sup>, *post*—The practice of merely stating in the abstract on appeal what the evidence tends to prove instead of setting forth the evidence at length, is commendable where no question as to the sufficiency of the evidence to sustain the verdict or judgment is raised.—*Shumway v. City of Burlington*, 424.
2. **AFFIRMANCE**—Supreme Court Rule 20 provides that the abstract shall contain so much of the record as may be necessary to an understanding of the question to be determined. Rule 68 provides that all immaterial matter shall be omitted. *Held*, that where some thirteen hundred questions and answers are set out in full, and the remaining answers printed in full, simply omitting questions, thereby bringing into the record a mass of irrelevant matter, the court will affirm the judgment, as authorized by Rule 21.—*Phillips v. Crips*, 605.
3. **DENIALS—Transcripts**—Denials and counter denials have a new effect under the new rules. All specific denials are now settled by a transcript which is ordered on application of the appellant.—*Haney & Co. v. Adaza & Co.*, 818,
4. **DISMISSAL—Filing**—After argument on the merits, an appeal will not be dismissed, as of course, because of failure to file the abstract within the time fixed by the rules.—*Parker v. Des Moines Life Association*, 117.
5. **STRIKING**—The supreme court will not strike an additional abstract, filed by appellee, on the ground that the same does not add to or take anything from appellant's abstract, when a comparison of the abstract shows that the additional

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abstract is necessary to a full understanding of the case.—  
Markey v. Markey, 373.

6. **SAME—Filing Late**—A motion to strike appellee's additional abstract, which contains material matter, from the files because not served and filed in the time fixed by the rules of the court, where appellant has not been prejudiced by the delay, will be overruled.—Allison v. Parkinson, 154; Galer v. Galer, 496.
- Affirmance**—See *ante*, 2.
7. **Appealable Orders**—An appeal lies from a ruling refusing to set aside an assignment of a cause for trial by jury, and to set it for trial to the court.—In re Bradley, 476.
8. **Same**—Under a statute allowing an appeal from an intermediate order involving the merits or materially affecting the final decision, an order directing a verdict is appealable.—Clark v. VanLoon, 250.
9. **DIRECTED VERDICT**—When a notice states that an appeal was taken from the finding and judgment of the trial court, but the record fails to show that any judgment was rendered, the appeal will be considered as taken from an order directing a verdict.—*Idem*.
10. **Judgment not yet Operative**—An appeal taken within five days of the date of judgment, should not be dismissed as premature, because the judgment provides that it shall not go into effect until after five days from its date. Such stay only affects the enforcement of the judgment.—Meredith, Dickey & Co. v. Peterson, 551.
11. **Verdict**—An appeal does not lie from the verdict of the jury.—Clark v. VanLoon, 250.

**Certiorari**—See 22, *post*.

**Co-parties**—See 13, *post*.

**Contempts**—See 22, *post*.

**Costs**—See 22, *post*.

**Default**—See 12, *post*.

**Denials**—See 2, *ante*.

**Directed Verdict**—See 22, *ante*.

**Dismissal**—See 4, *ante*.

**Evidence**—See 19, *post*.

**Exceptions**—See 24, *post*.

**Injunctions**—See 22, *post*.

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Instructions—See <sup>25</sup>, *post*.

Judgments—See <sup>10</sup>, *ante*; <sup>25</sup>, <sup>27</sup>, *post*.

New Trial—See <sup>25</sup>, *post*.

12. Notice—ON DEFAULT—Where a judgment is rendered against one person by default, no notice of appeal need be served on him.—*Bonnot Co. v. Newman Bros.*, 158.
13. ON CO-PARTIES—An appeal from a decree setting aside a special assessment for street improvements at the suit of owners of two abutting lots, will not be dismissed for failure to serve notice thereof on one of them, if the lots were entirely distinct and separately assessed.—*Mason v. City of Des Moines*, 658.
14. SERVICE—*Clerk and Deputy*—A notice of appeal may be served on a deputy clerk, though the clerk, who is not present, is accessible at the time.—*Cullison v. Lindsay*, 124.
15. SUFFICIENCY—A notice of appeal which notifies the plaintiffs that defendant appeals from the "rulings and judgments" of the district court rendered on certain specified dates is sufficient to admit of appellant presenting its exception to the final judgment, although such judgment was not rendered at either of the dates specified, where one of the dates is a mistake.—*Parker v. Des Moines Life Ass'n*, 117.

Objections—See <sup>29</sup>, <sup>30</sup>, <sup>31</sup>, <sup>32</sup>, <sup>33</sup>, <sup>34</sup>, <sup>35</sup>, *post*.

Parties—See <sup>16</sup>, <sup>21</sup>, *post*.

16. Parties Relieved—Where plaintiff's petition and defendant's counterclaim are dismissed, and the latter only appeals, the former cannot be given any relief.—*Lane v. Consigny*, 341.

Pleading—See <sup>25</sup>, *post*.

17. Record—*SHORTHAND REPORT—Documentary Evidence*—A certificate of a judge to the report of evidence is not insufficient for failure to identify documentary evidence introduced, if it states that the foregoing report and the documentary evidence therein referred to contains all the evidence introduced, and the exhibits are properly described and identified in the report, although they were not marked "*filed*."—*Mason v. City of Des Moines*, 658.
18. Rehearing—An issue not raised on the original hearing will not be determined on a rehearing.—*Cloud v. Malvin*, 52.
19. Review—Where the evidence is stricken and an equity cause presented on assignment of errors, refusal to suppress a deposition, nor refusal to grant a new trial for newly discovered evidence can be reviewed, the court not being able to



## APPEAL Continued

- assume that the new evidence was not cumulative, and where, to a defense that proof of death was not furnished in time, extension and waiver are pleaded, error in permitting recovery against the provisions of the policy cannot be reviewed as a matter of law, the evidence being stricken out.—*Teller v. Equitable Mutual Life Association*, 17.
20. **ABSTRACT QUESTIONS**—The court will not construe the rights of devisees in a will which may be defeated by the exercise of power to alter them, given to a life tenant.—*In re Stumpenhousen's Estate*, 555.
21. *Review for Appellee*—A finding in favor of appellant, from which the appellees have not appealed, is conclusive.—*Idem*.
22. **CONTEMPTS**—*Certiorari* will lie to determine whether an injunction was violated, though the district judge has found that a contempt has not been committed.—*Lake v. Wolfe*, 184.
23. **COSTS**—Though costs are, in a suit to set aside a conveyance as fraudulent, taxed against mere lienholders, the judgment will not be reviewed where the matter was not brought to the attention of the court below.—*Cloud v. Malvin*, 52.
24. **EXCEPTIONS TAKEN**—A case is reviewable on appeal, though no exception was taken to the judgment, where exception was taken to the conclusion of law on which the judgment is founded.—*Clement v. Drybread*, 701.
25. **INSTRUCTIONS**—*Abstract*—Where the abstract does not contain the evidence, but appellant's statement that it was conflicting upon a certain issue is not denied, errors in giving instructions on that issue may be considered.—*Jerolman v. C. G. W. Ry. Co.*, 177.
26. **JUDGMENT AT LAW**—On appeal in a law action the judgment will be sustained if it has material support in the testimony.—*Galagher v. Head*, 588.
27. **JUDGMENT NON OBSTANTE**—By moving for judgment notwithstanding a general verdict, on the ground that the special findings are inconsistent therewith, a party does not waive his right to complain, on appeal, of other errors.—*Cullison v. Lindsay*, 124.
28. **MOTION FOR NEW TRIAL**—Exceptions to rulings on evidence shown by the abstract to have been taken at the time the charge was given are sufficient, without a motion for a new trial, to entitle appellant to a hearing on such rulings.—*Clement v. Drybread*, 701.

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29. **OBJECTION BELOW**—A defendant who desires that the state shall elect upon which of several acts it will rely for a conviction, should make such request before the cause is submitted to the jury and if he fails to do so, is not entitled to any relief on appeal, because the election was not made.—*State v. Smith*, 440.
30. *Same*—An insurance company which failed to plead specially the failure of plaintiff to submit to an appraisal under the terms of the policy, cannot, for the first time on appeal, insist upon such failure as a defense.—*Smith v. Continental Insurance Co.*, 382.
31. *Same*—An objection that no claim was ever presented to the board of supervisors, cannot be raised for the first time on appeal.—*Smith v. McQuiston*, 868.
32. *Same*—Nor an objection, in an action on an assigned cause of action, that the assignment was not shown.—*Idem.*
33. *Same*—Nor the objection that the petition declared upon a willful injury, and that the court submitted the issue of negligence.—*Mahoney v. Dankwart*, 821.
34. *Same*—An objection that an order sustaining a motion to strike from the files a petition for a new trial entitled as of the May term was sustained at the preceding February term is not available on appeal where the court had jurisdiction of the subject-matter of the motion and petition and the appellant appeared to the motion and did not object that it was premature as to any of the relief asked—*McBride v. McClintock*, 826.
35. *Same*—One cannot on appeal first object that there was a departure from the prescribed rules of pleading.—*Cooper v. Cook*, 801.
36. **PLEADING BELOW**—In an action to set aside a special assessment, a claim that, as the improvement was not worthless, an allowance should be made for its value, cannot be considered on appeal when not presented by the pleadings or on the trial.—*Mason v. City of Des Moines*, 658.
37. **VERDICT**—In an action for personal injuries the defense was that between the 7th and 25th of a certain month the blasting of rock which caused the injury was done by an independent contractor, who had a written contract with defendant to do the work. Several witnesses testified that the contractor had charge of the work after the 7th, while plaintiff proved that the men blasting had previously been in defendant's service, and that defendant was about the work occasionally, but it did

## APPEAL Continued

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not appear that he exercised any control over the work after the 7th. *Held*, that a verdict for plaintiff was not sustained.—*Mahoney v. Dankwart*, 821.

38. *Same*—The jury has no right to arbitrarily disregard the testimony of an unimpeached and uncontradicted witness as to a fact which is not incredible.—*Idem*.
39. *Same*—In an action for support of a bastard, the witnesses for the prosecutrix, many of whom were of good character, testified that she was a woman of good repute. Witnesses for defendant, the most important of which were persons of bad character, testified that prosecutrix was a prostitute, and that she stated that she did not know that defendant was the father of the child. *Held*, that a verdict for the prosecutrix should not be reversed as contrary to the evidence.—*State of Iowa v. Seevers*, 788.

Shorthand Report—See 11, *ante*.

Transcript—See 3, *ante*.

Verdict—See 11, 27, 28, 29, *ante*.

40. *Waiver—Repleading*—By repleading matter in answer after it has been stricken, defendant does not waive exceptions to the ruling in striking such matter, even if the exceptions to the ruling on the new answer are not available on appeal from the first ruling, but can present the exceptions to the ruling on appeal from the final judgment.—*Parker v. Des Moines Life Association*, 117.

Wills—See 20, *ante*.

ASSIGNMENT—See GUARRANTY, 1; LIENS, 2.

ASSUMPTIONS—See MORTGAGES, 1; SALES, 1.

ATTACHMENTS—See MORTGAGES, 2, 4, 5; *torts*.

- 1 *Levy—Subsequent Writ*—Where an officer holds actual possession of personal property, under a writ of attachment, no affirmative act on his part is necessary in making a levy under a subsequent writ.—*German Savings Bank v. Oatmeal Co.*, 380.
2. *ESTOPPEL*—Where defendants whose property is attached file counterclaims based on a wrongful levy of attachment, and the sheriff takes manual possession, and continues to hold the property until the trial, neither party will be heard to say that there was no valid levy because notice of the attachment was not served.—*Schoonover v. Osborne*, 453.
3. *MANUAL TAKING—Promissory Notes*—Promissory notes can be attached by taking manual possession.—*Nordyke v. Charlton*, 414.

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ATTORNEY AND CLIENT

4. **SUFFICIENCY**—The return of a writ of attachment recited that defendant was not found within the county, and it further appeared that, four days after the levy was made both on real and personal property, notice of the levy on the real estate was served on him. *Held*, that the levy was sufficient, both on his real and personal property, so far as notice was necessary to its validity.—*Schoonover v. Osborne*, 453.

## ATTORNEY AND CLIENT.

1. **Authority**—An attorney is not authorized, on his own motion, to commence affirmative proceedings to keep alive a judgment which he has for collection.—*Cullison v. Lindsay*, 124.
2. **Charge and Proof**—**FRAUD**—Under an instruction that recovery is authorized where an attorney necessitated a transcript by putting into an abstract filed by him, statements as to evidence which he knows to be false, the attorney is not liable for putting in such evidence recklessly while having reasonable ground to believe that the statements are untrue.—*Idem*.
3. **SAME**—**Negligence of Attorney**—In an action by an attorney for services, the jury entered a general verdict in his favor, and found specially that he was negligent in certain matters, as claimed by the client. The court had instructed that if plaintiff was acting under the directions of another attorney, who had sole control of the case, he would not be liable for negligence. *Held*, that the special finding was not inconsistent with the general verdict.—*Idem*.
4. **Contract**—**Jury Question**—Replevin being brought against a judgment creditor and a levying officer, the attorney for the former employed another attorney, who, with knowledge of both defendants, conducted the defense. In a suit against such defendants, by the second attorney, for services, the evidence as to whether the first attorney held the judgment to collect on a contingent fee basis, and with no authority to employ assistance, was conflicting, the second testifying that the creditor admitted that the first attorney had such authority. There was evidence that the officer had requested the second attorney to take part in the case. *Held*, that the issue of an agreement by defendants to pay the second attorney for his services was for the jury.—*Idem*.
5. **Withdrawal of Attorney**—Where a client, after suit has been brought, denies liability for fees, unless successful, the attorney may withdraw, if his remaining is not necessary to a successful conduct of the suit.—*Idem*.

ATTORNEY AND CLIENT Continued

TO

BASTARDS

6. **SAME—Burden of proof**—Where an attorney withdraws from a suit, it cannot be presumed that the subsequent adverse result to his client was due to his withdrawal.—*Idem*.

ATTORNEY FEES—See BONDS, <sup>1</sup>; MORTGAGES, <sup>11</sup>; QUIET. TITLE, <sup>1</sup>.

ATTORNEYS—See CRIM. LAW, <sup>27</sup>; PARTNERSHIP; PLEA AND PROOF, <sup>3</sup>; PRACTICE, <sup>3</sup>, <sup>46</sup>.

BANKS—See ACCT. STATED; EVID., <sup>1</sup>, <sup>2</sup>, <sup>17</sup>; GUARANTY, <sup>4</sup>, <sup>5</sup>

1. **Authority of Bank Officers**—Where the management of a bank's affairs is intrusted to the president and cashier, and they, with knowledge of the directors, have conveyed land at various times, a conveyance by them is not invalid because not authorized by the directors.—*Steinke v. Yeizer*, 512.
2. **Preference of Creditor—DEBTS OF BANK**—One owning nearly one-half the stock of a bank, and being largely indebted to it, conveyed land to the bank in trust for the depositors. *Held*, that he had a legal right to prefer creditors of the bank over his own creditors.—*Idem*.
3. **Trusts—POWER OF TRUSTEE**—The deed created a power in the trustee, in its discretion, to sell or mortgage the land, in whole or in part.—*Idem*
4. **Informal Execution**—The bank having quitclaimed the property to a third person, who executed mortgages thereon, and reconveyed the title to the bank, subject to the mortgages, its quitclaiming as owner, and not as trustee, was an informality which did not deprive the mortgagees of their rights to a lien.—*Idem*.
5. **Sine—Intent to Execute**—The bank having secured the proceeds of the mortgages, and applied them to its business, the depositors receiving the benefit, and, the title being restored to the bank subject to the mortgages, this showed an intention to execute the trust in part, though this was not revealed by the conveyances themselves.—*Idem*.
6. **DEPOSITORS—Mortgagees**—Conceding the depositors did not receive the benefit of the loans, the bank, as trustee, being empowered to create the liens, the mortgagees should be protected.—*Idem*.
7. **Ratification**—Any informality in the proceedings was ratified by the bank's keeping the money, and the depositors, since they claimed through the bank, had only its rights.—*Idem*.

BASTARDS—See APPEAL, <sup>39</sup>; ESTATES, <sup>11</sup>.

1. **Evidence—Impeachment**—In an action for the support of a bastard, the general reputation of the prosecutrix as to chastity

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## BASTARDS Continued

- may be shown, as affecting her credibility; but particular unchaste acts cannot be proved, unless they occurred at or near the time the child was begotten.—*State of Iowa v. Seevers*, 738.
2. **CURING ERROR**—Error in permitting the prosecutrix to testify that she was without money to support her bastard child was cured by an instruction withdrawing the evidence.—*Idem*.
  3. **HARMLESS ERROR**—Where a mother of a bastard claimed she was seduced under promise of marriage, it was not prejudicial error to permit her to testify that she was divorced from her former husband, and that he had married again.—*Idem*.
  4. **SAME**—Error if any in admitting evidence that the prosecutrix in bastardy proceedings had been divorced from her husband and that he had married another woman, is not prejudicial to defendant, where the uncontradicted evidence shows that she had never met her husband for several years before the children in question were begotten.—*Idem*.
  5. **RELEVANCY**—In an action for the support of a bastard, it was not error to permit the prosecutrix to prove that soon after the child was born she was arrested for attempting to poison a witness for defendant, where there was evidence tending to show that the prosecution was instituted by defendant to influence the bastardy proceeding which was then pending.—*Idem*.
  6. **Instructions—Request**—No special reference need be made, in the absence of a request therefor, to testimony offered by defendant in bastardy proceedings that at the time conception took place he was suffering from an injury rendering him physically unable to have sexual intercourse, where such testimony was not referred to in the pleading.—*Idem*.
  7. **New Trial—DISCRETION—Newly Discovered Evidence**—Refusal of a new trial of bastardy proceedings for newly discovered evidence that the husband of the prosecutrix had sexual intercourse with her, at about the time the children in question were begotten, at a hotel in the southern part of the city, is not an abuse of discretion where the husband alone makes affidavit in regard thereto, his statements are in many respects unreasonable and improbable and are contradicted by the proprietors of all the hotels in that part of the city and by the testimony of prosecutrix.—*Idem*.
  8. **Recognition—Evidence**—The uncorroborated testimony of the sister of the deceased that, about 60 years before, she was present at the marriage of her brother; that plaintiff was the

## BASTARDS Continued

TO

## BENEFIT ASSOCIATIONS

fruit of such marriage; that she was present at the birth, and helped to rear plaintiff after his mother's death, which occurred when he was about 13 months old,—is not sufficient to establish the legitimacy of plaintiff, when the moral character of witness is shown to be bad, and she is directly contradicted by several witnesses, who had equal opportunity to know the facts, if they had existed.—*Markey v. Markey*, 873

9. *SAME*—The provision of Code 1879, section 2466, that to entitle an illegitimate child to inherit from his father, the recognition of the child by the father as his own "must have been general and notorious or in writing," is not satisfied by evidence that plaintiff was reared at the home of the father of deceased in Ireland, when not elsewhere at work, until he reached the age of 19 or 20, when he came to this country at the expense of the deceased, and went to his house in Illinois, where he remained for two years; that the deceased furnished him with clothing and spending money, collecting his wages, and introduced him as his son to some fifteen persons, five of whom testified to such fact.—*Idem*.

## BENEFIT ASSOCIATIONS.

1. *Expulsion—JURISDICTION*—Where the by-laws of a benefit association prescribe the method for expulsion of members, and provide that charges in writing shall be preferred and served on accused, an expulsion by a vote of the order, on a motion merely, is void.—*Byram v. Sovereign Camp*, 490.
2. *Same*—Observance of these by-laws is jurisdictional and not waived by the member's presence when a motion is adopted for his expulsion, and his failure to object in any manner to the proceedings or jurisdiction of the association to try him, except that he had restored the money which he is charged with having misappropriated, and had taken back certain dues paid by him.—*Idem*.
3. *Same*—The presence of the member so expelled when the motion is made is not an acquiescence in the proceedings.—*Idem*.
4. *WAIVER—By Appeal from Local Camp*—Where a member is expelled from a benefit association, which acts without authority, his appeal to the Sovereign Commander, who affirms the action of the camp, does not make effectual his expulsion.—*Idem*.
5. *Same*—A by-law of a fraternal association which provides for an appeal to the Sovereign Commander from the action of a local camp in expelling a member of a Sovereign Commandery and that his decision shall be final, unless reversed

## BENEFIT ASSOCIATIONS Continued TO BONDS

by the sovereign camp, does not contemplate an appeal from the Sovereign Commander to the sovereign camp.—*Idem*.

6. **FAILURE TO ENFORCE REINSTATEMENT**—Such beneficiary in a certificate issued by a benefit association may maintain an action thereon, notwithstanding that the association during the member's life-time undertook to expel him and he was not reinstated by mandamus or otherwise.—*Idem*.
7. **DUES**—In an action by a beneficiary against a benefit association, defendant cannot defeat its liability by claiming a failure to pay an installment of dues, where the association had attempted his expulsion, and would not have received the dues.—*Idem*.
8. **Suit by Beneficiary**—Where the by-laws of a benefit association include the father among those whom a member may designate as his beneficiary, and a member designates his father, he is the proper party to sue for the benefit, although such member may leave a wife and child surviving.—*Idem*.

**BONDS**—See LIM OF ACT, \*

1. **Attorney Fees**—An obligee, in an action on a bond, cannot have judgment for attorney's fees, where he failed to show that he is entitled thereto.—*Seeberger v. Wyman*, 527.
2. **County Treasurer—LIABILITY OF SURETIES—Expiration of Term**—Sureties on a county treasurer's bond, conditioned that their principal will properly pay over to the person entitled all money which may come into his hands by virtue of his office, and account for all balances remaining in his possession at the termination of his office, are liable for his defalcation after the expiration of his term of office, and before his successor qualifies.—*Plymouth County v. Kerseboom*, 304.
3. **Construction**—Where the obligation of a bond to a receiver is to pay whatever sums the court requires, not exceeding a specified amount, the receiver cannot complain of the refusal to allow him the full amount of the bond.—*Idem*.
4. **Stay Bonds—Validity**—A bond conditioned for the payment of the price of property sold by order of the court, in such sums as the court may direct, and providing that, in case of default, it is to have the force and effect of a stay bond, and execution may issue against the obligors, is a valid obligation, enforceable by an action.—*Idem*.
5. **Where Void in Part**—Whether such provision, giving it the force of a stay bond, is invalid, is immaterial, since, if invalid, it does not affect the remainder of the bond.—*Idem*.

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## BREACH OF PROMISE

## BREACH OF PROMISE.

1. **Damages**—Proofs of specific elements of damage are not necessary in an action for breach of promise, and some recovery is surely warranted where evidence of mental suffering is without conflict.—*Rime v. Rater*, 61.
2. **Defenses**—That plaintiff was hysterical or subject to nervous or convulsive fits, is no defense to the action.—*Idem*.
3. **Evidence**—Direct evidence of the promise is not required. It may be inferred from behavior during a period of years, and is often made out by attentions shown, exchange of presents, purchase of clothing and preparation for the marriage relation.—*Idem*.
4. **SAME**—Testimony of witness in action for breach of promise that defendant paid plaintiff a good deal of attention is admissible; but, if not, is without prejudice, where witness fully explains what she means, and states what defendant did to show his affection.—*Idem*.
5. **SAME**—Evidence of the wages of an engineer on a certain railroad is admissible, in action for breach of promise to marry, to show defendant's ability to earn money, and the condition in life which plaintiff might reasonably have received in consummation of the contract, defendant at one time having been such engineer.—*Idem*.
6. **Cross-examination**—The evidence of wages received being admissible only, to show ability to earn money, and the condition in life which plaintiff might reasonably have attained by the marriage, it is not proper cross-examination to inquire whether defendant was blacklisted during a railroad strike.—*Idem*.
7. **MENTAL SUFFERING**—Plaintiff's testimony as to her mental suffering is admissible in an action for breach of promise.—*Idem*.
8. **Refusal**—Action for breach of promise to marry will lie, without request on plaintiff's part, where defendant refused to marry plaintiff.—*Idem*.
9. **Statute of Limitations**—An allegation of a promise to marry sometime during the year, and that the promise was broken "before the winter of 1894," is not demurrable because of the statute of limitations. That statute does not begin to run until breach where, as here, the promise is general, and, therefore, continuous; and the petition does not state the exact date when the breach occurred.—*Idem*.

BREACH OF PROM. Continued TO CONST. LAW

10. SAME—Assuming (but not deciding) that action on breach of promise is barred in two years, it was not error to refuse a charge that plaintiff's action was barred, when the original petition did not fix the date of breach and an amendment averred postponement from time to time to a date more than two years after the promise, and a renunciation of the promise then, the court having instructed that plaintiff could not recover unless refusal to marry was made at said last date, the only one definitely fixed in the pleading, no other breach being relied on.—*Idem*.

BREACH OF WARRANTY—See EVID., <sup>10</sup>, <sup>11</sup>, <sup>12</sup>, <sup>13</sup>, <sup>21</sup>, <sup>22</sup>.

BRIDGE—See HIGHWAYS.

BUILDING AND LOAN ASSOCIATION—See GEN. ASSIGN., <sup>1</sup>.

CASHIER—See BANKS, <sup>1</sup>.

CERTIORARI—See APPEAL, <sup>22</sup>; PRACTICE, <sup>4</sup>.

CHATTEL MORTGAGES—See RECEIVERS, <sup>1</sup>.

CHECKS—See NOTES AND BILLS, <sup>4</sup>, <sup>5</sup>.

CHURCHES—See RELIG. CORP.

CLAIMS—See ESTATES, <sup>2</sup>, <sup>3</sup>.

COMPROMISE—See EVID., <sup>1</sup>.

## CONSPIRACY.

**Evidence—Land Sale**—In an action on contracts for the purchase of land alleged to have been fraudulently obtained, a letter written by one of the members of a partnership with whom the contract was subsequently made, referring to negotiations with another person for the purchase of the land but expressing the opinion that the latter's offer was not sufficiently favorable and suggesting that an attempt be made to interest defendant in the matter, stating that if he was induced to come up the writer would stay by him to carry it the way he offered it to such other person and that if defendant came the writer would "fix him" is insufficient to show a conspiracy to defraud defendant where such other person had been received as a partner before the contracts were made with defendant.—*Dorr v. Cory* 725.

## CONSTITUTIONAL LAW—See DAMS, <sup>1</sup>.

1. JURY TRIAL—It is not a violation of the constitutional provision securing to a citizen his property unless deprived thereof by "due process of law" to refuse a jury trial in condemnation proceedings.—*In re Bradley*, 476.
2. Title of Act—An act entitled "An act to amend section 1898 of the Code, relating to building and loan association." (Acts Twenty-seventh General Assembly, chapter 48) is not within

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## CONST. LAW Continued

## TO

## CONTRACTS

Constitution, Article 3, Section 29, providing that every act shall embrace but one subject, and matters properly connected therewith, which subject shall be embraced in the title, because it also deals with contracts between the association and its members; such contracts being "matters properly connected" with building and loan associations.—*Guaranty S. & L. Association v. Ascherman*, 150.

CONTEMPTS—See INTOX. LIQ., 2, 3, 4, 5, 6.

**CONTRACTS**—See ATTORNEY AND CLIENT, 4; DAMAGES, 4; ESTATES, 1; EVID., 13 to 17, 43 to 46; HUSB. AND WIFE, 4; NOTES, 2, 3; PLEA AND PROOF, 2.

1. **Action on**—*What is*—Where an owner of land sues to recover for coal taken therefrom by another, and for damages thereto, and the jury find separately the value of the coal and the amount of damages, the judgment, to the extent of the former is on contract and not on *tort*.—*Devin v. Walsh*, 428
2. **Back of Note**—An agreement written on the back of a note is a part thereof.—*Heaton v. Ainley*, 112.
3. **Certainty**—A contract which provides for the purchase of a specified aggregate number of sets of scales at a specified differing prices for different sets and that a certain number of sets shall be taken in stated years is not so uncertain that no action for breach may be bottomed thereon, though it does not specify what number of each kind was to be taken.—*Kimball Bros. v. Deere, Wells & Co.*, 676
4. **SAME**—Contract for the sale of goods whereby payment is to be made solely out of the buyer's profits, who is to sell for cash, deduct certain expenses, render stated accounts showing sales and remit to the seller each week all money taken in, over and above the authorized deductions, and once a year to furnish a complete inventory, is not void for uncertainty.—*Clement v. Drybread*, 701.
5. **Construction**—Under a contract for the purchase of certain manufactured articles, providing that such articles should be made "from the patterns" of a certain company manufacturing such goods, and that "no change from said patterns" should be made without the consent of the purchaser, manufacturer was not required to use the identical patterns which had been used by the company referred to, but only to furnish articles in which there was no change, as to the several parts thereof, from the finished product of such company made from such patterns.—*Kimball Bros. v. Deere, Wells & Co.*, 676.

## CONTRACTS Continued

6. *Same*—A contract requiring plaintiff to make certain articles for the defendant, according to certain specified patterns was not broken where plaintiff changed such patterns, but did not use the changed patterns in making any goods for the defendant.—*Idem*.
7. **ASSUMPTION**—Where, on the dissolution of a partnership, the remaining partner agrees to pay the firm liabilities, shown by the books, he is not concluded from questioning whether any particular claim is a firm liability, where it appears that he was to pay all firm liabilities whether they appeared on the books or not.—*Hanks v. Flynn*, 165.
8. **NOTE**—Where a wife executed a note, stipulating that it was given to secure the payee against loss he might sustain by reason of any account, indorsement, or signing of any notes or other papers of the husband, and the husband was then indebted for a balance on account, the note secures such account, though, through inadvertence, the name of the husband is not, in terms, repeated in the writing.—*Heaton v. Ainley*, 112.
9. **PRINCIPAL OR AGENT**—A contract signed, "Iowa National Bank, by William Daggett," is the contract of the bank, and not of the party making the signature; and this construction is not affected by the use of the pronouns "we" and "our" in the contract.—*Thilmany v. Iowa Paper-Bag Co.*, 357.
10. **Evidence**—*Held*, insufficient to show that the payee of a note had agreed to cancel same and the mortgage to secure them, the burden being on the maker.—*Harvey v. Henry*, 168.
11. **Express and Implied**—Where there is evidence of a contract for board, in which the price was not fixed, a recovery on an implied contract is authorized.—*Allison v. Parkinson*, 154.
12. **Fraud**—**REPRESENTATIONS AS TO CONTENTS**—*Negligence*—It is no defense to an action on a contract, part of which was type-written and the balance printed matter, that the printed matter provided that the goods sold, if not paid for, should remain the property of the seller, and that the purchaser, without reading the same, though having full opportunity so to do, was, on inquiry, informed that it was merely a guaranty of the goods sold.—*Bonnot Co. v. Newman Bros.*, 158.
13. **Law of Sister State**—A contract of suretyship by a married woman domiciled in Iowa, made while temporarily in Indiana, cannot be enforced in Iowa, since, under the laws of Indiana (Burns' revised statute, section 6964) such a contract is void,

## CONTRACTS Continued

and a contract void where executed cannot be enforced by the courts of Iowa. — *Nichols & Shepard Co. v. Marshall*, 518.

14. **Modification of Interest Contract—Evidence**—Plaintiff claimed that by agreement with defendant, the rate of interest on a mortgage was changed from seven to eight per cent. at the time when a second mortgage on the same property was given, on which the interest was seven per cent. Defendant was at all times in default on his interest. The evidence showed a payment by defendant, after the semi-annual interest on the first mortgage was due, and before that on the second mortgage was due, of an amount equal to eight per cent., and a payment after the interest on the second mortgage was due of an amount equal to seven per cent. Future payments of interest were of the same character. *Held*, sufficient to show that the interest agreed upon for the first mortgage was eight per cent.—*Phillips v. Crips*, 605.
15. **Performance**—Where plaintiff contracted to build a well and to secure a supply of water, or to receive no pay, and no water was secured, and the well was bored so crookedly that a pump could not have been placed therein, he cannot recover on the contract.—*Sherzer v. Buckholz*, 750.
16. **Principal and Agent**—Where the agent of a creamery company, which purchased the stock of another company, made a public statement of the terms on which the purchasing company would receive milk from the former patrons of the creamery, delivery of milk on the faith of such statement, if authorized, constituted a contract binding on the company.—*White v. Elgin Creamery Co.*, 522.
17. **Release**—A release by a contractor of one of the parties to the contract from liability thereunder, intended merely as a settlement of the liability, and a promise not to sue him, is not a technical release which would release the co-obligors.—*Haney & Co. v. Adaza C. Co.*, 313.
18. **FORGERY**—Where subscribers to a contract to build a plant form an association, and accept the plant and operate it, the association cannot defend against an action on the contract for the price, because of forgery of some of the subscriptions, this being neither an action to rescind or against the original signers.—*Idem*.
19. **PARTNERSHIP—Estoppel**—A co-partnership which has taken possession of a creamery plant by its proper officers and is using the same, cannot relieve itself from its obligation to pay the contract price, nor relieve its assets from the lien, because some of the signers of the contract who did not sign

CONTRACTS Continued TO COURT AND JURY

collusively and who have taken no part in the management of the business and have never become partners have been released from their liability by the assignee of the contract.—*Idem*.

20. Subscription—DEFENSES—*Burden of Proof*—A subscription paper provided that the sums subscribed might be paid by notes. *Held*, in action on the subscription, that the burden of showing that the notes had been executed and paid was on the subscriber.—*University of Chicago v. Emmert*, 500.

CONVERSION—See FRAUD. CONV., 2; JUDGMENTS, 1.

CORPORATIONS—See AGENCY, 2, 3.

1. Corporate Name—*Right to Use*—In 1883 certain cattle breeders organized the Red Polled Cattle Club of America, and in 1887 published a herd book which was prepared by one M. as secretary, and copyrighted by him. In 1888 the society incorporated in Illinois under the same name. In 1895 defendant incorporated in Iowa, M. being a member thereof as well as a member of the corporation in Illinois. In 1890, the Illinois corporation published its first volume of a herd book. M. assigned volumes 1 and 2 of the herd book to the Iowa corporation. *Held*, that the Iowa corporation had no right to take and use a name similar to that already in existence, where it was calculated to deceive the public dealing with it.—*Red Polled Cattle Club v. Red Polled Cattle Club*, 105.
2. Injunction—A corporation may protect its corporate name by enjoining another corporation subsequently organized from using the same name in a way to injure the business of the former corporation, where the use of the same name by both corporations is calculated to deceive the public and to injure the former's business, although the latter was not guilty of actual fraud in adopting the same name.—*Idem*.
3. Unincorporated Societies—*Change to Corporations*—A corporation organized under the name by which a former voluntary club was known, upon the unanimous vote of all the members of such club voting upon the question, although some members did not vote, succeeds to any right the club may have had to the use of such name.—*Idem*.

COSTS—See APPEAL, 2; MAL. PROS., 2; RECEIVERS, 1.

COUNTY TREASURERS—See BONDS, 1.

COURT AND JURY—See PRACT., 2, 1.

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## CR. M. LAW

## CRIMINAL LAW—See APPEAL, 2.

1. **Adultery—Who May Prosecute**—On the remarriage of husband and wife after a divorce, the husband may institute a complaint against a third person for adultery committed with the wife during their former marriage—*State v. Smith*, 440.
2. **CONDONATION**—By re-marrying his first wife after being divorced from her, with knowledge of adultery committed by her with a third person during the former marriage, a husband does not condone the offense of the third person, so as to bar a criminal prosecution against him.—*Idem*.

**Amendment**—See 13, *post*.

**Arson**—See 3, *post*.

**Attorney**—See 27, *post*.

**Billiard Halls**—See 28, *post*.

3. **Burglary—Indictment**—Though an indictment for burglary must set out the owner of the building entered, a mistake in the Christian name of such owner, and owner of the goods intended to be stolen, is immaterial, in the absence of prejudice to the accused.—*State of Iowa v. Wrand*, 73.

**Character**—See 4, *post*.

**Circumstantial Evidence**—See 14, 16, 17, *post*.

**Election**—See 4, *post*.

**Escape**—See 6, *post*.

**Evidence**—See 11, 12, 14, 16, 17, 24, 26, 29, *post*.

4. **ACTS NOT CHARGED—Election**—One convicted of adultery under an indictment charging one specific act on a day named, cannot complain on appeal that evidence of more than one act was received, where there was no proof of the commission of the offense on the day charged in the indictment, and it does not appear which of the several other acts proved was first shown, and no request for an election was made.—*State v. Smith*, 440.
5. **CHARACTER**—Good character is not a defense, but should be considered, in connection with all the other facts, in determining guilt; its weight being solely for the jury.—*State of Iowa v. House*, 68.
6. **ESCAPE**—An attempt of accused, under indictment, to escape, is a circumstance proper to be considered, though it tends to prove a distinct offense.—*State of Iowa v. Wrand and Hawley*, 73.
7. **MINUTES ON INDICTMENT NO LIMITATION**—The state is not confined to the minutes in examining the witnesses.—*Idem*.

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## CRIM. LAW Continued

8. **OBJECTIONS**—Evidence received without objection in a criminal case need not be stricken.—*State of Iowa v. Moats*, 13.
9. **SECONDARY EVIDENCE**—In a prosecution for arson, a copy of a copy of an insurance policy covering the burned property is not admissible as secondary evidence, where no reason is shown for not introducing the copy from the original.—*State of Iowa v. Cohen*, 208.
10. **False Pretenses—Jury Question**—Prosecutor, an eccentric and weak minded man, testified that accused and another induced him to sign a deed of his farm by representing it to be an application for insurance and that he received no money therefor. The person who, with the accused, had procured the deed, testified that the transaction was a sale of the farm, and that the prosecutor received a second mortgage on it, and a certain sum in cash, the proceeds of a loan made on the farm for the buyer, less the amount of the prior mortgage thereon, which was paid off; a receipt for the money alleged to have been paid the prosecutor was produced, but he testified that accused had induced him to sign a white paper, and that he did not sign the receipt. The mortgage back to the prosecutor was not recorded and delivered until accused was suspected of the fraud, and, when the deed was signed by prosecutor, accused and the other person went there ready to close the bargain and with the papers prepared for signature. Accused retained all the papers and the other person negotiated the loan on the farm before its purchase. *Held*, that a conviction for obtaining the deed by false pretenses was warranted.—*State of Iowa v. Moats*, 18.
11. **MENTAL CAPACITY OF PROSECUTOR**—In a prosecution for obtaining a deed by false pretenses, evidence of prosecutor's mental condition subsequent to signing it, and that his condition was the same prior thereto, and continued unchanged up to the time of the trial, was admissible, where prosecutor was a witness, to aid the jury in understanding his strength of mind when the deed was signed and determining his credibility.—*Idem*.
12. **EVIDENCE—Rebuttal**—The defense to a prosecution for obtaining a deed by false pretenses was that the transaction was a sale of the lands, part of the consideration being the payment of money to prosecutor; and in corroboration thereof a receipt signed by prosecutor was produced. Prosecutor testified that he did not sign the receipt but signed a blank paper; and there was evidence that the receipt was written by accused. An accomplice testified for accused that he went to prosecutor's place alone and procured the receipt.



## CRIM. LAW Continued

*Held*, evidence that, on the day when the receipt was produced, accused was seen near prosecutor's house, was admissible in rebuttal of the accomplice's testimony, and to corroborate the evidence that the receipt was written by accused.—*Idem*.

**Indictment**—See <sup>1</sup>, <sup>1</sup>, *ante*; <sup>24</sup>, <sup>30</sup>, *post*.

13. **Information—Amendment**—An information before a justice of the peace may be amended, by substitution, in the district court on appeal.—*State of Iowa v. Reilly*, 735.
14. **Instructions—CIRCUMSTANTIAL EVIDENCE**—Where the evidence is wholly circumstantial, an instruction that the jury need not be satisfied beyond a reasonable doubt of each link in the chain of evidence relied on to establish guilt, it being sufficient if, taking the testimony all together, they are satisfied of guilt beyond such doubt, which instruction is repeated in substance, and nowhere limited or explained, is erroneous, as authorizing a conviction though an essential fact be not proved beyond a reasonable doubt. Such a charge is not equivalent to an instruction, that it is not incumbent on the state to prove beyond a reasonable doubt every circumstance offered in evidence and tending to establish a fact essential to conviction.—*State of Iowa v. Cohen*, 208.
15. **SAME**—While it is not necessary that each essential fact in the chain of circumstances solely relied on to connect the accused with the commission of the offense, when separately considered, should be found beyond reasonable doubt, yet if conviction depends entirely on different circumstances arranged linkwise, each and every link must be established beyond a reasonable doubt.—*Idem*.
16. **SAME**—Instruction is also erroneous as requiring the jury to pass on each fact separately.—*Idem*.
17. **SAME**—The rule that there should be no conviction on circumstantial evidence unless the facts establish the guilt beyond all reasonable doubt and be incompatible with any reasonable hypothesis of innocence, does not refer to all facts, but to such as are essential to conviction. *State of Iowa v. House*, 68.
18. **REASONABLE DOUBT**—An instruction defining a reasonable doubt as one that the jury are able to give a reason for is erroneous, as, in effect, placing the burden on defendant to furnish reasons for acquittal and as requiring jurors to give a reason for their conclusion.—*State of Iowa v. Cohen*, 208.

## CRIM. LAW Continued

19. **REQUESTING**—An appellant who did not ask further instructions cannot complain that those given were not full and explicit; hence, one charged with seduction cannot complain that the court in its charge did not refer to evidence concerning the prosecutrix's association with other men prior to the seduction, where the issue as to previous chaste character was fully submitted to the jury, and nothing further was asked.—*State of Iowa v. Olson*, 667.
  20. **Same**—In a case where the evidence is wholly circumstantial, and the court charges that if the facts are proven beyond reasonable doubt, sufficient to satisfy the jury of defendant's guilt beyond all reasonable doubt, they may convict—error cannot be predicated on its failure to add, *of its own motion*, that conviction must be consistent with every reasonable hypothesis of guilt, and inconsistent with any reasonable hypothesis of innocence.—*State of Iowa v. House*, 68.
  21. **Jurors—KNOWLEDGE OF DISQUALIFICATIONS**—The fact that a juror was a member of the jury on a former trial of the case is no ground for a new trial, though counsel for accused were unaware of that fact, where it does not appear that accused himself had no knowledge thereof.—*State of Iowa v. Busamus*, 11.
  22. **SAME**—That a juror was biased on his *voir dire* and concealed that fact, is no ground for a new trial, unless it appears that his bias was unknown to accused.—*State of Iowa v. Moats*, 18.
- Jury Question**—See <sup>10</sup>, *ante*; <sup>22</sup>, <sup>23</sup>, <sup>29</sup>, *post*.
28. **Larceny—Jury Question**—Shortly after defendant left a relative's house, where he had been visiting, they missed some gold coin and paper money. No one else except the family had free access to the room where the money was kept, and defendant knew the money was kept there and was once found in the room where it was kept. Defendant purchased a ticket to a place to which he had previously stated he was going, but instead he went directly to another place: claiming to have done so to avoid riding on a freight train. The following day he deposited in a bank in the latter place money corresponding substantially with that missed. He claimed to have had the coin a number of years, keeping it in a purse which he lost before he made his visit, but the finder testified that there was no gold in the purse. Defendant had a small account with the bank and claimed to have had a large amount of money at interest during all the time he claimed to have had the gold.

## CRIM. LAW Continued.

He does not explain why he failed for so long to deposit the money he claims to have carried, nor why he did not also put it on interest. *Held*, that a conviction of larceny was sustained, though defendant's good character was proven.—State of Iowa v. House, 68.

24. **FINDING STOLEN GOODS**—Property stolen at the same time and place is properly received in evidence against one accused of stealing other property, where it was found on the person of one jointly indicted with accused; they being seen together before and after the burglary.—State of Iowa v. Wrand, 73.
  25. **Minors—Billiard Hall**—One permitting minors to be in a room where he sells cigars, candy, and peanuts, and keeps two billiard tables, on which people generally are permitted to play pool at a fixed fee per game, violates Code, section 5002, prohibiting the keeper of a billiard hall from permitting minors to remain therein.—State of Iowa v. Johnson, 245.
  26. **Minutes on Indictment—Sufficiency**—The grand jury's minutes of the evidence of a witness before the committing magistrate stated that, on or about April 13th, P., marshal of R., apprehended defendants with four others, in the stock yards in R., that defendant L. was first arrested, and on his person was found a piece of black veiling and a portion of a bolt of dress goods, which were identified by M. as part of the stolen property; that defendants H. and B. sold W. a coat and vest, which were identified as part of the stolen property, on the same day. *Held*, that under Code, section 5272, requiring a "brief minute of the substance of the evidence" to accompany the indictment, this was sufficient, in connection with the names of the states' witnesses indorsed on the indictment, to apprise accused of the witnesses the state would call, and the matters relating to which they would testify.—State of Iowa v. Wrand, 73.
- Objections—See <sup>2</sup>, *ante*.
27. **Private Counsel for State**—An objection that attorneys interested in a civil action in which a recovery was asked on account of matters involved in the criminal prosecution, were permitted to assist in the criminal prosecution, contrary to Code, section 305, made for the first time on motion for a new trial after a conviction, is too late where it does not appear that the court knew of the disqualification of such attorneys, and where counsel for accused knew of it when the trial commenced, and said private counsel were guilty of no intentional wrong.—State v. Smith, 440.

CRIM. LAW (Continued)

TO

DAMAGES

**Reasonable Doubt**—See <sup>18</sup>, *ante*.

28. **Seduction—JURY QUESTION—Chastity**—A finding in a trial for seduction that the prosecuting witness was of previous chaste character is warranted although there was evidence that on several occasions she had conducted herself imprudently with others.—*State of Iowa v. Olson*, 667.
29. **EVIDENCE**—The evidence is sufficient to establish the use of seductive arts on the part of one charged with seduction where the testimony of the prosecuting witness in that respect is strongly corroborated by the defendant's letters to her, though part of the arts used was a promise to marry if conception occurred.—*Idem*.
30. **INDICTMENT**—An indictment charging the seduction of a certain "unmarried person" of previously chaste character sufficiently avers that the prosecutrix was an unmarried woman.—*Idem*.

**DAMAGES.**

1. **Duty to Mitigate**—A physician who, in an action for injury to plaintiff's leg, had testified that the adhesion was not to the bone, but to the fasciae; that it did not interfere with the range, but with the freedom of motion; that the wound might be painful with changes of the weather, and would be so under any condition of weather if the nerves were caught up in the scar, should be allowed to testify whether a slight surgical operation, involving but little inconvenience to the patient, would break adhesion and restore the leg to its normal use, so that there would be no retarding of motion, or special inconvenience from the scar.—*Bailey v. City of Centerville*, 20.
2. **Instructions**—An instruction, in an action for personal injury, that the jury should determine to what extent plaintiff had been disabled, and whether such disability will "probably" continue, and allow her for such disability such sum as the evidence shows her entitled to, is not erroneous as allowing recovery for disability other than what the evidence showed was reasonably certain to continue, especially where in the same instruction the jury were told that plaintiff could only recover such damages as were caused solely by the accident, in determining whether there would be future damages.—*Idem*.
3. **INSTRUCTIONS AND EVIDENCE—Future Pain**—Submission to the jury of the question of future pain, in an action for personal injuries, is error; there being no evidence that there would be any, and plaintiff seeming at the time of the trial

**DAMAGES Continued**

to be well of his injuries, so far as they would cause him pain.—*Wheeler v. City of Boone*, 285.

4. **MARRIED WOMAN—SEPARATE EMPLOYMENT**—Evidence that the plaintiff, a married woman, owned a sewing machine, and took in sewing regularly, and made thereby five to ten dollars a month is evidence of a separate employment sufficient to allow her, in an action for personal injury, to recover for loss of earning capacity.—*Bailey v. City of Centerville*, 20.
5. **EARNINGS OF WIFE**—In an action of a wife to recover damages for injuries inflicted, her loss of time cannot be considered as an element of damages, where it is not shown that she has any employment apart from her husband.—*Denton v. Ordway*, 487.
6. **MEASURE OF DAMAGES**—Where plaintiff was entitled to recover, in an action for damages for the breach of a contract for the purchase of a specified number of articles, of several different kinds, to be manufactured by plaintiff, and furnished, with "reasonable promptness," on defendant's orders, the measure of such damages for the articles not furnished was the difference between the contract price of the class thereof on which plaintiff would have received the smallest profit and the cost to plaintiff of manufacturing the number thereof which would have been required to fill such contract, making a reasonable deduction for the less amount of time required by plaintiff, its employes and factory, for the release from the trouble and responsibility incident to a full execution of such contract on plaintiff's part.—*Kimball Bros. v. Deere, Wells & Co.*, 676.
7. **EXCESSIVE VERDICT**—Where plaintiff's spine was permanently injured, and partial paralysis ensued, in an accident caused by defendant's negligence, and he suffered excruciating pain, which would probably continue, a verdict of \$8,000 was not excessive.—*Stomne v. Hanford Produce Co.*, 137.
8. **PARTY TO SUIT**—Damages for wrongful attachment should not be made to depend upon a verdict in a suit to which respondent in damages was not a party.—*Miller v. Beck & Co.*, 573.
9. **PLEADING**—A prayer for judgment for a certain amount because of permanent injury to plaintiff's leg is sufficient, in the absence of a motion for more specific statement, to allow a recovery for loss of earning capacity resulting therefrom.—*Bailey v. City of Centerville*, 20.
10. **PLEA AND PROOF**—In a counterclaim for breach of contract special damages not necessarily incident to the breach, such as expense in introducing goods sold the agent and loss of profits

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## DAMAGES Continued

## TO

## DECEDENTS

on an order taken by another agent and not turned over, must be pleaded.—*Rosenberger & Co. v. Marsh & Co.*, 47.

11. **Proximate Cause**—In an action for damages for permanent loss of health resulting from extreme fright caused by the negligent manner in which defendant blasted rock near plaintiff's house, it was shown that plaintiff was accustomed to blasting; that for about two weeks she had been somewhat startled and annoyed by defendant's blasting; that on the day when the extreme fright was caused she had been warned that the blast was going to be set off and left the house for a place of safety, her mother remaining in the house; that she was frightened about her mother, and, after the blast, returned to the house; and the house and furniture was somewhat shattered by the shock; and that her mother suddenly collapsed, and plaintiff thought she was dying. *Held*, that plaintiff's fright was not caused directly by the blast, but by her mother's condition, and that she could not recover.—*Mahoney v. Dankwart*, 321.

## DAMS.

1. **Constitutional Law**—Laws Seventeenth General Assembly, chapter 188, which provide that the owner or owners of any dam or obstruction across any water course in this State shall within a reasonable time construct and maintain over and across said dam a fish way which will afford a free passage for fish up and down and through said water course, and that any dam not so provided within a reasonable time shall be abated as a public nuisance, is not, as to one who owns on both sides of a stream, and who has maintained a dam there for twenty-three years, unconstitutional, as depriving him of his property without due process of law; nor does such act constitute a taking of private property for public use without just compensation.—*State of Iowa v. Beardsley*, 395.
2. **Police Power**—The requirement by the legislature that dams across streams shall be so constructed as not to interfere with the passage of fish is a legitimate exercise of the police power of the state.—*Idem*.
3. **NUISANCE**—It is the province of the legislature, within the fundamental limitations upon its authority, to prescribe what shall constitute a nuisance.—*Idem*.
4. **Prescription**—By maintaining a dam for twenty years the owner does not acquire a prescriptive right, as against the power of the state to compel the erection of fish ways.—*Idem*.

DECEDENTS—PERSONAL TRANSACTIONS WITH—See ESTATES, 4, 5, 6, 7.

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DEEDS

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**DEEDS**—See DURESS; EVID., <sup>3</sup>, <sup>4</sup>; MTGES., <sup>3</sup>; SALES, <sup>4</sup>.

1. **Husband and Wife—RATIFICATION**—To prove that a wife ratified a mortgage by her husband, it was shown that she afterwards joined in a quitclaim deed to the land, never disclaimed her husband's act, and made no defense to the foreclosure. *Held*, that this was insufficient.—*Waughtal v. Kane*, 268.
2. **Preemption—DOWER**—Where a husband preempted land and paid for it by a land warrant, his wife acquired a dowable interest in the land which could not be taken away by a conveyance made by her husband alone.—*Purcell v. Lang*, 198.
3. **Right to Repurchase**—A deed reserved to the grantor the right to repurchase at a certain price within two years. A witness who heard the negotiations testified that it was agreed that if the grantor desired to take the land off the grantee's hands, at a certain price, within two years, the latter would redeed it to him. The grantor testified that he reserved the right to repurchase by paying the sum named in the deed, "which was only given for securing the same as a mortgage." The grantee testified that he was to deed the land back within two years "if he still owned it." *Held*, that the evidence did not sustain the grantor's contention that the deed was a mortgage. Besides, as the arrangement to reconvey created nothing but an option to repurchase, the grantor made no debt for a mortgage to secure.—*McLaughlin v. Royce*, 254.
4. **DEMAND**—Where a deed provided that the grantor might repurchase of the "grantee or his assigns" within a certain time, a demand and tender by the grantor to the grantee, with knowledge of the sale of the land by the latter to a third person, are not sufficient; they should be made to the assignee.—*Idem*.

**DELIVERY**—See MTGS., <sup>18</sup>.**DEMAND**—See APPEAL, <sup>31</sup>; DEEDS, <sup>4</sup>; QUIET TITLE, <sup>1</sup>, <sup>2</sup>.**DEMURRER**—See BREACH OF PROMISE, <sup>9</sup>, <sup>10</sup>.**DIRECTED VERDICT**—See PRACT., <sup>9</sup>.**DIVORCE.**

1. **Connivance in Adultery**—Adultery of a wife, committed with a spy employed by the husband to test the wife's virtue, does not entitle him to a divorce.—*May v. May*, 1.
2. **CONDONATION**—A husband's acts of cruelty, for which the wife is largely to blame, are condoned by her failing to make complaint, apologizing for her own conduct, and con-

DIVORCE Continued

TO

ELECTIONS

tinuing to live with him, where no future danger to her life or health are to be apprehended.—*Idem*.

**Marriage—Presumptions**—On the issue whether a claimant under a policy is legally a beneficiary of a life policy as the legal wife of the insured, it will be presumed that he obtained a divorce from a first wife before he married claimant.—*Parsons v. Grand Lodge, A. O. U. W.*, 6.

**DOWER**—See **DEEDS**, 2; **HUSBAND AND WIFE**, 1.

## DRAINAGE PETITION.

**"ADJACENT OWNER" DEFINED**—"Adjacent owners," within Code 1878, title 10, chapter 2, requiring a petition for a ditch to be signed by "a majority of persons resident in the county, owning land adjacent to such improvement, \* \* \* setting forth the necessity of the same," are the owners of land abutting on the improvement, and not the owners of all the land within the congressional subdivision through which it runs.—*Wormley v. Board of Supervisors*, 232.

## DURESS.

1. **Reconveyance**—An instrument which is executed by a man of twenty-seven, not acting under physical restraint, will not be set aside for duress, the weight of evidence as to threats being that none were made, and no corroborating circumstances being shown.—*Galt v. Provan*, 561.
2. **PARTIES**—An action to set aside a deed reconveying land that had been previously conveyed to a grandson by his grandmother when she was of unsound mind, and to have the deed executed by her adjudged to be valid, cannot be successfully maintained by the grandson, though his deed reconveying the land to her was executed at the instance of interested third parties, who were intermeddlers.—*Idem*.

**ELECTION**—See **APPEAL**, 22; **PLEAD.**, 4, 5.

## ELECTIONS.

1. **Australian Ballot**—**APPEAL**—*Review for Appellee*—One who wins below may show without appealing or assigning error, that, upon the face of the record, the court below erroneously ruled against him and that if the right ruling had been made the error against appellant would be harmless.—*Voorhees v. Arnold*, 77.
2. **TRIAL DE NOVO**—The question whether a mark on a ballot was deliberate and usable to identify, is not tried *de novo* on appeal.—*Idem*.



## ELECTIONS Continued

3. **IDENTIFICATION MARKS**—Under code, sections 1119, 1120, providing that election ballots must be marked with a cross in the circle at the head of a ticket, or in squares opposite the names of the candidates, and that ballots marked in any other way, "so that such mark may be used for the purpose of identifying such ballot," shall be rejected—where the unauthorized mark is not of a character to be readily used for such purpose, or is made accidentally or through inexperience in the use of a pencil, the ballot must be counted, but where the mark may be so used and is made deliberately, the ballot must be rejected.—*Idem*.
4. *Same*—The law does not recognize the writing of a name on the ballot except by inserting it in the ballot in the proper place.—*Idem*.
5. *Same*—Where the voter writes the name of a person below the printed ticket on the margin of the ballot, the ballot must be rejected.—*Idem*.
6. *Same*—Where the printed ticket has a blank in which to write the name of a candidate, and the voter places a cross in the square opposite such blank, but writes no name therein, the ballot must be rejected.—*Idem*.
7. *Same*—Where a part of the ticket of one party is printed at the bottom of the ballot, with blanks in which to write the names of candidates, and the voter marks his ballot in the squares only, placing a cross therein opposite the candidates of that party, except in one instance, and writes the name of a candidate in one of the blanks, but does not place a cross in the opposite square, the ballot must be rejected.—*Idem*.
8. *Same*—Where the voter writes the name of a constable below and on the margin of a ticket, without making a cross, the ballot should be rejected.—*Idem*.
9. *Same*—There are cases where the cross has many additional marks, made in an effort to mark properly, where, yet, every additional mark makes a wider departure from a correct cross and, in some, there is more than a cross. Yet, these should not be rejected unless the departure was deliberate and may be used to identify. In fact the departure may be so complicated that it may be held, as matter of law, not to constitute an identification mark, for the reason that the maker could not well describe it to another.—*Idem*.
10. **Jury Question**—A doubtful question as to whether unauthorized marks were made with deliberate intent, and can be used to identify the ballot, is one of fact for the trior.—*Idem*.

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## ELECTIONS Continued TO ESTATES

11. *Same*—Where a voter marks his ballot in the squares, in several of which it is doubtful whether the lines really form a cross, and in one of which the lines just meet, so that no cross is formed, the question whether the departure from the prescribed markings was deliberate, or merely accidental or careless, is one of fact for the trier.—*Idem*.
12. *Same*—Where a voter marks a ballot in the squares opposite the names of the candidates of one party, except in three instances, and opposite the name of the other party for one of the same offices is a dirty spot, as if rubbed with the finger, covering and extending below the square, but without the slightest indication of the making of a cross in the square, the finding of the court on the doubtful question of the voter's intent and the effect of such marking must prevail.—*idem*.
13. *Same*—Where a voter places a cross in the circle at the head of the ticket of one party, draws a line from the top of the perpendicular line of the cross downwards to the horizontal at an angle of about thirty degrees, places a cross in the circle opposite the ticket of another party, and then attempts to rub it out, and leaves a dirty spot much larger than the circle and faint tracings of the cross in the circle, the rejection of the ballot will not be interfered with.—*Idem*.

ERROR WITHOUT PREJUDICE—See BASTARDS, 2, 3, 4.

## ESTATES.

1. **Antenuptial Contract**—*Legatees and Devisees*—An antenuptial contract, providing for the payment annually of a stated sum of money to a testator's widow, is a charge upon the personal estate of the testator, and real estate devised by the will cannot be subjected to the payment thereof, though all personal estate has been bequeathed by the will and the legacy has been materially diminished by a judgment awarding the widow a distributive share in such personal estate.—*Pitkin v. Peet*, 480.
2. **Claims**—**PAYMENT**—*Burden of Proof*—The provision of Code, section 3340, that the burden of proving that a claim is unpaid shall not be placed on the party filing a claim against the estate, applies to a claim for board of decedent, so that it is necessary to prove only the contract therefor to establish a *prima facie* case, but where the purpose of plaintiff in an action against testatrix's estate, on a claim, in introducing her will, made just before her death, is not apparent, except that plaintiff's counsel, in argument, refers to a direction therein that all just debts of testatrix be paid, the declaration therein "I owe no

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## ESTATES Continued

- debts to anyone," is sufficient to require plaintiff to prove that his claim was not paid.—*Murphy v. McCarthy*, 38.
3. **ARTIFICIAL PERSON—Pleading**—Under Code, section 3333, *et seq.* requiring claims against an estate to be entitled in the name of the claimant against the administrator of the estate, as such, with the name of the estate, etc., the claimant need not aver in what capacity—whether as a corporation, partnership, or person—it acted in presenting the claim, as is required in ordinary actions by section 3627, unless the pleading is assailed by motion.—*University of Chicago v. Emmert*, 500.
  4. **Evidence—TRANSACTION WITH DECEDENT—Testimony of Husband and Wife**—Code, section 4604, providing that no party to an action, and no husband or wife of any party shall be examined as a witness in regard to any personal transaction between such witness and a person deceased, does not prohibit the husband of plaintiff from testifying to a conversation between plaintiff and deceased in which the husband did not participate.—*Allison v. Parkinson*, 154.
  5. **EVIDENCE OF SECRETARY OF CLAIMANT**—In an action by an artificial person against a decedent's estate, the secretary of plaintiff, not shown to have any interest in the result, is not incompetent to testify to a personal transaction with deceased.—*University of Chicago v. Emmert*, 500.
  6. **Executors and Administrators—POWERS TO BIND ESTATE**—An administrator cannot bind his estate by contract, except pursuant to statutory authority.—*Valley National Bank v. Crosby*, 651.
  7. **SAME**—Even if the authority of an administrator over real estate conferred by Code 1873, sections 2402, 2403, 2404, authorizes borrowing money for its benefit, that can be done only on due notice of those interested in the estate.—*Idem*.
  8. **RULE APPLIED**—An administrator cannot bind the estate for money borrowed for repairs, but not needed nor used by the estate, on order of the court, without notice to the heirs; and such action is not validated by an *ex parte* order of the court, authorizing him to execute notes therefor in his capacity as administrator.—*Idem*.
  9. **ESTOPPEL**—Knowledge by a mother of the fraudulent intention of her son in executing a mortgage will not estop her to maintain an action as administratrix of the son to set aside the mortgage as fraudulent.—*Lee v. Marion Savings Bank*, 716.

## ESTATES Continue

10. *Evidence*—In an action by an administratrix to cancel an alleged fraudulent mortgage executed by the intestate, evidence of what he told her, before his death, concerning the mortgage, is inadmissible to show that she had knowledge of its invalidity before her appointment, and of the subsequent sale of the mortgaged property.—*Idem*.
11. *Heirs—BASTARD—Recognition*—The children of an illegitimate daughter of testator's brother are entitled to a share in a devise to his heirs, in the right of their grandfather, when he and their mother are both dead, and she had been recognized by her father as his child, so as to be entitled to inherit from him.—*Johnson v. Bodine*, 594.
12. *JUDGMENT AGAINST*—Under McClain's Code, section 3731, providing that damages for wrongful death shall be disposed of as personalty of the decedent, and shall not be liable for his debts, where he leaves a child, wife or parent, money recovered for the wrongful death of a person leaving a father and mother and no wife or child immediately descends to the father and mother in equal shares, and their interest therein may, after payment of the judgment into court, be applied in payment of a judgment against them.—*Cassady v. Grimmelman*, 695.
13. *Evidence*—In equitable proceedings, under Code 1873, sections 3150, 3154, to compel a judgment debtor to apply, in satisfaction of the judgment, moneys which, as administrator of the estate, he holds for himself individually, as his distributive share of such estate, decedent's unprobated will, not pleaded either in bar or in abatement is immaterial.—*Idem*.
14. *Parties*—In a proceeding to subject to the payment of a judgment the interest of one of the next of kin of a decedent in a judgment recovered for negligently causing the death of said decedent, the other next of kin are not necessary parties.—*Idem*.
15. *Remedies*—An administrator who is also an heir, is not subject to garnishment for his distributive share to satisfy a judgment against himself individually. And there being no adequate legal remedy, equity will compel a judgment debtor who, as administrator of an estate, has possession of moneys belonging to himself individually, as his distributive share, to apply such moneys in payment of the judgment.—*Idem*.
16. *HEIRS, PER CAPITA AND PER STIRPES*—Where a testator leaves his estate to his two brothers for life, with the remainder to be "divided between my heirs-at-law," the heirs, consisting of children and grandchildren of deceased's brothers and sisters,

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take per stirpes, and not per capita, unless the will manifests a different intention.—*Johnson v. Bodine*, 594.

**ESTOPPEL**—See **ATTACH.**, 2; **CONTRACTS**, 20; **ESTATES**, 9; **MTGS.**, 14, 15, 17, 18; **REDEMPTIONS**, 1.

**EVIDENCE**—See **AGENCY**, 1, 4, 5, 7, 9; **BASTARDS**, 1, 5, 9, 9; **BREACH OF PROMISE**, 1, 2, 3, 4, 5, 6, 7; **CONTRACTS**, 10, 14, 20; **CRIM. LAW**, 5, 6, 8, 9, 11, 12, 14, 15, 16, 17, 18, 24, 25, 29, 30; **ESTATES**, 2, 4, 5, 10, 12; **FRAUD. CONV.**, 1, 2, 3, 4, 6; **INTOX. LIQ.**, 9, 10, 11, 12; **MAL. PROS.**, 1, 2; **MUN. CORP.**, 5, 6, 7, 8, 9; **PRACT.**, 11, 12, 13, 14, 15, 16, 17, 18; **WILLS**, 7, 8, 9, 10.

**Abbreviations**—See 2, *post*

1. **Admissibility**—In an action for the price of goods sold, letters written by defendant, and containing admissions of liability to the amount of plaintiff's claim, with the exception of a few small items, and inclosing a note for the amount, less such reductions are admissible, even though an offer of compromise, where containing statements of fact proper to be considered by the jury.—*Rosenberger & Co. v. Marsh & Co.*, 47.
2. **SAME**—Defendants statement to a third person, in plaintiff's absence, before executing the note sued on, expressive of his reluctance is inadmissible, though the statement was communicated to plaintiff who replied that the note was to be used only as collateral.—*Clement v. Drybread*, 701.
3. **RULE APPLIED**—Defendant sent a note payable to plaintiff in response to plaintiff's letter stating that he desired to use it in his bank, and that he would credit it on defendant's cash account, and would take care of it when due. *Held*, in an action on the note, that the letter constituted a written contract, the ambiguity in which could be explained by parol evidence as to the status of the parties when the note was executed, and hence it might be shown whether defendant was then owing plaintiff.—*Idem*.
4. **SAME**. But evidence of plaintiff's declaration that the note was to be used by him only as collateral was not admissible.—*Idem*.
5. **Agency**—See 15, 16, *post*—Under a claim for a breach of a contract made by the agent of the adverse party, the latter may prove the actual authority given such agent.—*Rosenberger & Co. v. Marsh & Co.*, 47.

**Appointment**—See 9, *ante*.

6. **Authority of Signer for Corporation**—A contract being assigned by an artificial person, it was competent, as showing his authority, to prove the official position, with the assignor of the person who attached its name to the assignment.—*University of Chicago v. Emmert*, 500.

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7. **Bank President—KNOWLEDGE**—That the president of a bank knows of the desire of a shipper of goods to prevent the shipment from being seized on a certain claim against him, does not deprive the former of the right, in good faith, to secure the bank for advances made to the shipper by having the shipments changed to his own name.—*Lee v. Marion Savings Bank*, 716.
8. *Same*—A bank is bound by the acts of its president in respect to a transaction between him and a third person and by his knowledge of the latter's purpose to defraud his creditors in such transaction.—*Idem*.
9. **RECITALS IN DEED**—Recitals in a receiver's deed, of his appointment, the order of sale, and the sale to grantee, are not, as against a third person, *prima facie* evidence of his appointment and authority to make the conveyance, and the court's indorsement of its approval on such receiver's deed is not of itself sufficient to dispense with proof of the facts recited.—*Lawless v. Stamp*, 601.

**Banks**—See <sup>2, 4, 5</sup>, *ante*; <sup>17</sup>, *post*.

10. **Breach of Warranty**—See <sup>21, 22, 23</sup>, *post*—One who makes a conditional sale of an engine and who, after reclaiming it for failure of the purchaser to comply with his contract, is sued for rescission of the contract and return of the consideration for breach of warranty, may testify that after reclaiming the engine it did good work while in the same condition as when sold to plaintiff.—*McKay v. Johnson*, 610.
11. **SAME**—Where the defense to an action for the breach of a warranty of a machine was that its failure to do the work warranted was due to the incompetence of the operator, evidence that a year after the purchaser had abandoned it, while in the same condition as when the purchaser had it, and operated by others, the work done by it fulfilled the warranty, is admissible.—*Swanson v. Allen*, 419.

**Burden of Proof**—See <sup>12</sup>, *post*.

**Competency**—See <sup>24, 25, 26</sup>, *post*.

**Compromise**—See <sup>1</sup>, *ante*.

**Construction**—See <sup>14, 17</sup>, *post*.

12. **Construction of Guaranty—Admissibility**—Letters written by a guarantee to his guarantor subsequent to the making of the contract of guaranty, and containing self-serving declara-

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tions, are not admissible in evidence, in action upon the guaranty, as an aid to the proper construction of the contract, where such declarations are irrelevant to any issue in the case, and the contract is clear and unambiguous.—Thilmany v. Iowa Paper-Bag Co., 357.

**Contracts**—See <sup>14, 15, 45, 50</sup>, *post*.

13. **BURDEN OF PROOF**—The burden is upon the buyer of goods under a contract providing for payment out of the profits alone but requiring him to make periodical remittances of the proceeds of sales, to show that he had nothing to remit, where the seller insists that the terms of payment in the contract have ceased to be binding by his failure to make weekly remittances and that the indebtedness has become due and payable.—Clement v. Drybread, 701.
14. **INTERPRETATION**—Where defendant had contracted to purchase of plaintiff manufactured articles of certain specified kinds and the contract was not ambiguous, it was proper, in an action on such contract to reject evidence that plaintiff had manufactured and set aside for defendant articles of other kinds, not mentioned in such contract.—Kimball Bros. v. Deere, Wells & Co., 676.

**Contradiction**—See <sup>26</sup>, *post*.

**Corporations**—See <sup>3</sup>, *ante*.

15. **Cross-Examination**—In an action for breach of a contract of agency to sell cigars, where the agents (jobbers of cigars, etc.) claimed a loss of trade because of being deprived of the sale of such cigars, alleged to be of high quality, the principal may cross-examine one of the agents with reference to the manufacture and sale in the agent's town of another cigar known by the same name as the principal's cigar, and their respective merits.—Rosenberger & Co. v. Marsh & Co., 47.
16. *Same*—Where defendants claimed an exclusive and continuing contract to sell plaintiff's cigars, defendant may be cross-examined as to whether he considered the contract binding on him.—*Idem*.
17. **Declarations**—Declaration of a president of a bank made when he was not transacting the business of the bank are not admissible against it.—Lee v. Marion Savings Bank, 716.
18. **DECLARATIONS AS TO TITLE**—Declarations affecting one's title to personal property, made previous to his acquiring title thereto under a bill of sale, are not competent evidence against him to defeat his title.—Tuttle v. Cone, 468.

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Deeds—See \*, *ante*.

19. **Depositions—Variance from Notice**—Under a notice to take depositions of *J. T. Langley, John Potter, Ode Terrell, and G. Berlin*, were taken the depositions of *J. T. Longley, Jonathan S. Potter, S. Orren Tyrrell, and A. H. Berlin*. Held, that the variance was fatal.—*Harlan v. Richmond*, 161.
20. **Exclusion**—See \*, *post*—*Presumption*—The presumption being that evidence offered by a party will be favorable to him, error in excluding it is not waived by failing to make a showing as to what it is proposed to prove, where the character of the answers is evident from the nature of the questions.—*Swanson v. Allen*, 419.
21. **Experts**—In an action arising out of a breach of warranty of a traction engine, which was to be delivered to plaintiff at F. in good condition, defendant, an expert witness, in support of his claim that its failure to work was due to plaintiff's mismanagement, may be asked to state whether it would have been impossible for the valve in the engine if in good condition when it left his shop, with a competent engineer, on the trip to F., to have become worn as he found it when it was subsequently returned to him by plaintiff.—*McKay v. Johnson*, 610.
22. **SAME**—An expert may testify as to the duty of the engineer to keep the setscrews tight, and that it would have been impossible for the engine, considering its condition when sold and the amount of work done, to have been in the condition in which it was returned, if it had been in the hands of a competent engineer.—*Idem*.
23. **SAME**. In a suit to rescind a contract for the purchase of an engine, when the question is as to the condition of the engine when delivered, and its treatment while in possession of plaintiff, a witness cannot give his opinion as to plaintiff's competency to run an engine.—*Idem*.
24. **COMPETENCY**—A witness who is familiar with wire cables from working about and with them for many years, and has repaired cables on elevators, is competent to testify as an expert on the question as to the safety of a partly worn cable on an elevator, although he has never constructed an elevator.—*Stomae v. Hanford Produce Co.* 187.
25. **Same**—That witness is a practicing physician does not render him competent to state the value of nursing. But when he is told what disease was attended, the condition of the patient and the care required, a statement by such witness that he



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- knew the value of the nursing is *prima facie* evidence that he is qualified to answer the question, especially where the only objection made is that witness is not shown to have knowledge of the treatment received by the patient.—Allison v. Parkinson, 154.
26. *Value*—In conversion of bicycles, one not familiar with such machines in general, nor with the particular make of machine in controversy, is nevertheless a competent witness as to its value, there being other sufficient evidence of competency.—Tuttle v. Cone, 468.
27. **CONSTRUCTION OF WRITINGS**—The opinion of a witness as to the construction of a contract is incompetent.—University of Chicago v. Emmert, 500.
28. **HYPOTHETICAL QUESTIONS**—A hypothetical question, based on facts as shown by the evidence, is proper, though not in all respects accurate.—Allison v. Parkinson, 154.
- Guaranty**—See <sup>12</sup>, *ante*.
29. **Harmless Error**—Possible error in rejecting evidence as to damages for the breach of a contract, where the jury found there was no breach, is harmless.—Rosenberger & Co. v. Marsh & Co., 47.
30. **SAME**—Where a fact is shown in evidence without conflict, error in excluding further evidence thereof is harmless.—Cullison v. Lindsay, 124.
31. **SAME**—The fact that the by-laws were not in evidence in an action by a building and loan association against a member on a contract of which the by-laws were a part cannot affect the judgment, where, if in evidence, they would only show facts not disputed.—Guaranty S. & L. Assn. v. Ascherman, 150.
32. **SAME**—In a suit by an attorney for services, in rendering which the client claimed he had been negligent, the erroneous admission of evidence for the attorney on the issue of negligence was harmless, where the jury found against him thereon.—Cullison v. Lindsay, 124.
33. **SAME**—Admission of testimony is without prejudice, the same state of facts having been testified to by another without objection.—Rime v. Rater, 61.
34. **Exclusion**—Error in excluding from the evidence a letter containing a contract of guaranty is without prejudice, where the writing of the letter is admitted by the guarantor.—Thilmany v. Iowa Paper-Bag Co., 357.
35. **Objection Below**—Where portions of a letter offered in evidence were excluded on objection made, and there was nothing prej-

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udicial in the part admitted, the reading of a part of the excluded portion, without further objection, was not sufficient ground for the granting of a new trial.—Kimball Bros. v. Deere, Wells & Co., 676.

Hypothetical Questions—See <sup>2</sup>, *ante*.

36. Impeachment of Pleading—ESTOPPEL—Where plaintiff filed a verified reply to an answer, he is presumed to have known the contents of the reply, and of the answer to which it was directed; and hence the question asked him on cross-examination, if he knew the contents of the answer when he verified his reply denying it, is immaterial.—Morey v. Laird, 670.

37. Intent—When it is material to determine the motive or intention with which an act was done, the testimony of the person doing it as to his motive and intention, is competent evidence.—Kruise v. Seiffert & W. Lumber Co., 352.

38. Rule Applied—On an issue whether a note taken by an employe from the agent of the master for wages due him was taken in payment, the employe may testify as to the intent with which he took the note.—*Idem*.

39. Judicial Notice—The court takes judicial notice that "acct" stands for "account."—Heaton v. Ainley, 112.

40. Leading Questions—Discretion—The trial court has considerable discretion in allowing leading questions on direct examination, especially where the witness does not readily understand the English language.—Kruise v. Seiffert & W. Lumber Co., 352.

41. Life Tables—Where there was evidence that a servant's injuries were permanent, life expectancy tables were properly admitted.—Stomne v. Hanford Produce Co., 137.

42. Offer—Limiting Scope of—Where the transcript of testimony given by a witness in one case is introduced in another, the jury may compare the testimony therein with that given by the witness in the second case, though the transcript was introduced merely to show what the witness "said on a given issue" and not to show that his testimony in the transcript was truthful.—Cullison v. Lindsay, 124.

Offer to Compromise—See <sup>1</sup>, *ante*.

Opinions—See <sup>2</sup>, <sup>3</sup>, *ante*.

Ordinances—See <sup>2</sup>, *post*.

43. Parol Variance—See <sup>60</sup>, *post*—Collateral Contract—An agent's oral agreement, in making a sale in which he had a special interest, by written contract that, as an additional inducement,

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he will surrender certain notes held by him against the buyers, may be shown by parol in an action on such notes by the agent, though the written contract of sale, made in the name of the principal, was complete.—*Harvey v. Henry*, 168.

44. TRUSTS—Land was conveyed to plaintiff on condition that she should support the grantor for life and afterwards exchanged for land of a third person, which, by mistake, was conveyed to plaintiff absolutely. To rectify the mistake she conveyed it to the first grantor, on the agreement that he should reconvey to her on condition of support. Thereafter and before he reconveyed, the land was seized under an attachment against him. *Held*, that evidence of the parol agreement for the reconveyance on condition of support was not inadmissible as ingrafting an express trust on the deed to the first grantor.—*Zuber v. Johnson*, 273.

45. SAME—Though the contract respecting the procurement of the mortgage was made in behalf of the mortgagor by an agent who executed it in her name as principal, and part of the consideration for the assignment of the mortgage furnished on behalf of the mortgagor was, in fact, the agent's money, the mortgagor's beneficial ownership of the premises could be established by parol, it not being an attempt by the principal to establish a trust in the agent.—*Harrington v. Foley*, 287

Pleading—See <sup>10</sup>, *ante*; <sup>46</sup>, <sup>48</sup>, *post*.

Practice—See <sup>10</sup>, *ante*.

Presumptions—See <sup>20</sup>, <sup>22</sup>, *ante*.

Receivers—See <sup>9</sup>, *ante*.

Recitals—See <sup>9</sup>, *ante*.

46. Relevancy—In an action to recover for injuries inflicted by defendant it is error to admit evidence of their permanency where the petition does not allege such fact.—*Denton v. Ordway*, 487.
47. *Same*—Whether plaintiff is a member of any church is immaterial in an action to recover damages for injuries inflicted by defendant.—*Idem*
48. SAME—An ordinance requiring persons blasting within the city limits to cover the orifice in which the explosive is placed, is admissible under a petition charging that two blasts were set off in such a negligent manner as "to cause loose fragments of rock to be thrown upon plaintiff's home, to her constant fear."  
—*Mahoney v. Dankwart*, 321.
49. ORDINANCES—An ordinance prescribing the manner in which sidewalks shall be built, is admissible in an action against the

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city for personal injuries for the purpose of showing that the walk in question was constructed in an improper manner.—*Shumway v. City of Burlington*, 424.

50. **Secondary Evidence—Admissibility**—Evidence that witness did not remember when he last saw a contract, and that he could not tell whether it was at home or elsewhere, or whether another person had it, was insufficient to authorize the admission of parol evidence of the contents of such contract.—*Williams v. Williams*, 91.
51. **SAME**—It is proper to ask a witness if he did not write plaintiff to do a certain thing, and it does not call for the contents of the letter.—*Rosenberger & Co. v. Marsh & Co.*, 47.
52. **SAME**—Witness may state what defendant said in a letter to plaintiff, part only of which he saw, loss of the letter being shown.—*Rime v. Rater*, 61.
53. **Statute of Frauds—Sale of Corn to be Shelled**—A contract for the sale of corn to be shelled, and that unfit for shelling to be thrown out, is within the statute, as no labor was necessary to produce or procure the corn.—*Lewis v. Evans*, 296.
54. **Title**—See <sup>18</sup>, *ante*—Evidence of negotiations for the purchase of certain personal property, between strangers to a bill of sale thereof, is not competent to defeat the title acquired under such circumstances.—*Tuttle v. Cone*, 468.

**Trusts**—See <sup>44</sup>, <sup>45</sup>, *ante*.

**EXCEPTIONS**—See **PRACT.**, <sup>18</sup>, <sup>19</sup>, <sup>20</sup>.

**EXECUTORS**—See **ESTATES**, <sup>6</sup>, <sup>7</sup>, <sup>8</sup>, <sup>9</sup>, <sup>10</sup>, <sup>11</sup>, <sup>12</sup>.

**EXPECTANCY TABLES**—See **EVID.**, <sup>41</sup>.

**FACTORS**—See **FRAUD**, <sup>2</sup>.

1. **Account—WAIVER**—Where a factor sends his principal statements of sales made, in which he does not state the gross price received on sales, but merely the net price after deducting from the former price charges for cartage, for demurrage claimed by the railroad company for detention of cars in unloading, and for commissions, and the principal, with knowledge of the way the statements are made up, accepts them as correct, he is bound by them, if in fact correct.—*Everingham v. Halsey*, 709.
2. **SETTLEMENTS**—Where, on settlement of account, a principal gave his factor a note for the balance due, in an action thereon, additional charges, then made by the factor, should be disallowed.—*Idem*.

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3. *Same*—Where, on a settlement of account between a principal and his factor, the former was charged with a sum paid to the railroad as demurrage, which was refunded, but the principal credited with only a part thereof, in action by the factor for balance on account the principal will be credited with the full amount as of the date of the settlement, it not appearing when it was refunded.—*Idem*.

FELLOW SERVANTS—See RAIL., 3.

FORECLOSURE—See MORTGAGES, 10, 11.

FORGERY—See CONTRACTS, 18.

FRAUD—See INSUR., 9, 10, 11; SALES, 2, 3; TAXAT., 6.

1. *Evidence*—A debtor engaged in shipping poultry, to prevent his creditor from seizing the shipments, had them made in the name of a president of a bank with which he did business. Afterwards the debtor gave his note, secured by a mortgage on all his property, to the bank, to obtain an alleged credit at the bank; and a certificate of deposit, payable on presentation, was properly indorsed and delivered to a third person, to whom the debtor was not indebted, and left in his hands for six months. No reason therefor appeared, other than it was to hinder and defraud said creditors. Afterwards the certificate was pledged as collateral. The president was thoroughly acquainted with the debtor's circumstances and business, and knew of the debt, and of the debtor's desire to avoid paying it. *Held*, that the note and mortgage are fraudulent as against said creditor.—*Lee v. Marion Savings Bank*, 718.
2. COMMISSIONS—*Fraud*—A factor cannot be deprived of commissions on account of an honest mistake in rendering his account.—*Everingham v. Halsey*, 709.

## FRAUDULENT CONVEYANCES.

1. *Burden of Proof*—HUSBAND AND WIFE—The burden is upon the wife to show that after conveyance to her by her husband, which is attacked by his creditors, he has enough property left to pay their claims.—*Seekel v. Winch*, 102.
2. *RELATIVES*—Where a conveyance from one relative to another is attacked by the grantor's creditors as fraudulent, fraud will not be imputed to them because of the relationship alone, but it or a state of facts from which it may be inferred, must be proved.—*Conry v. Benedict*, 664.
3. *EVIDENCE*—*Consideration Between Mother and Children*—Transfer held invalid in part.—*Cloud v. Malvin*, 52.

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GEN. ASSIGN.

4. **EVIDENCE**—A conveyance of real and personal property made by the holder of the title to his father-in-law pending litigation with a third person, is not fraudulent where the sale had been long contemplated, an adequate consideration, (made up in part of an alleged debt due grantee from grantor said to have been evidenced by promissory notes held by grantee), was paid and the transfer was made in view of the intended removal from the state of the grantor who had never invested anything in the property and against whom it was not certain that a judgment would be recovered, and this, though grantee made sworn returns that he had no moneys and credits during the period he claims to have held said notes and though he aided grantee to avoid garnishment.—*Conry v. Benedict*, 664.
5. **CONSIDERATION**—A conveyance of land without consideration, to hinder and delay creditors, gives the grantee no title or right of possession, as against creditors.—*Knorr v. Lohr*, 181.
6. **Future Support**—An agreement for future support is insufficient as a consideration to uphold a conveyance, as against the grantor's creditors.—*Seekel v. Winch*, 102.
7. **Gifts**—**TIME MADE**—A gift of land held not to have been made or completed in time to be paramount to the rights of donor's creditors.—*Hadley v. Stalker*, 623.
8. **Limitation of Action**—**Recording Deed**—An action to recover the value of land held by a defendant as security and fraudulently conveyed by him by a deed which appears of record is barred by the lapse of five years from the date of record although plaintiff is a nonresident of the state and had no actual notice of the fraud.—*Clark v. Van Loon*, 250.
9. **Trover**—**Title**—Proof of a bill of sale, duly executed and delivered to plaintiff, previous to an attachment of the property included therein by an alleged creditor of the vendor, though fraudulent in fact, is sufficient evidence of title to enable the vendee to recover in an action for conversion against the attaching creditor, in the absence of proof by the attachment plaintiff that he is a creditor of the attachment defendant.—*Tuttle v. Cone*, 468.

GAMING CONTRACTS—See NOTES AND BILLS, 1, 2, 3.

## GENERAL ASSIGNMENTS.

1. **Purchase of Assignee's Equity**.—**BUILDING AND LOAN ASSOCIATIONS**—A purchaser at an assignee's sale of the assignor's equities in land, which, prior to the sale, had been conveyed to the purchaser for the benefit of the assignor, and upon which

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## TO

## GUARANTY

the purchaser had secured a loan from a building and loan association, subscribing for stock of the association in his own name and pledging the same as collateral security, is entitled, as against the assignor or assignee, to the benefit of payments made by them upon the stock.—*In re Assignment Broom Co.*, 346.

2. **SAME**—Claimant, being the owner of certain premises, borrowed money from a building association for a third person, and gave a mortgage on the premises to secure the same. At the same time claimant purchased in his name shares of stock in the association, which were also pledged as additional security, and the third person agreed to pay the monthly installments thereon. The payment of the installments would mature the stock at the time the mortgage became due, and would pay it. In consideration of the agreement to pay the mortgage to the loan company, and another one on the same premises to another, the claimant agreed to deed a part of the premises to such third person, after the assignment of the latter for the benefit of creditors, but before all the installments were paid, claimant purchased the equity of the insolvent in said premises under an order of court, and paid the mortgage, and new certificates of stock issued to him. *Held*, that claimant is under no obligation to the insolvent's estate to account for the installments paid by insolvent on said stock.—*Idem*.

## GIFTS—See FRAUD. CONV., 1.

**Competency of Donor—Evidence.**—The donor was over 70 years of age, and his physical health was failing. His memory had failed, and he was in the habit of repeating things. Witnesses who well knew him testified that his mind and judgment were sound. Another witness testified that he had a transaction with him and he was rational and intelligent. *Held*, insufficient to establish his incompetency to make a valid gift.—*Galer v. Galer*, 496.

## GUARANTY.

1. **Assignability**—A mere offer of guaranty to a particular firm, which is inoperative until acted on by the firm, is unassignable.—*Schoonover v. Osborne*, 453.
2. **Construction**—Under a guaranty of payment of money to be advanced by a firm of two members, the guarantor is not liable for advances made by one of them after he succeeded to the firm business, though such change does no harm to the guarantor.—*Idem*.

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## GUARANTY Continued

## TO

## HOMESTEADS

3. **Continuing Guaranty**—A continuing guaranty which is not exhausted by the extension of credit to the limit named, is evidenced by an instrument whereby one party, in consideration that the other will sell goods upon credit, to a third person, from time to time guarantees the prompt payment of all bills at their maturity, "said maturity to be sixty days from date of bills; hereby waiving any and all notice of times or amounts of sales or of defaults or delays in the payment therefor, not exceeding \$400.00."—*Fisk & Co. v. Rickel*, 871.
4. **Ultra Vires**—**BANKS**—Under revised statute United States, section 5136, authorizing national banks to exercise all powers necessary to carry on the business of banking, where a bank directs a letter to a person, stating that it will guaranty fulfillment of the obligations of another person to the former for a certain amount of goods for a certain time, and it does not appear that the second person purchased the letter or deposited any security therefor, or that the bank had any interest in the transaction, the letter, considered either as a guaranty or letter of credit, is void, and the bank is not liable thereon.—*Thilmany v. Iowa Paper Bag Co.*, 333.
5. **Same**—A national bank is not authorized to guaranty the fulfillment of the obligation of another unless such guaranty is made in connection with the transfer of a chose in action or other property belonging to the bank.—*Idem*.

**HARMLESS ERROR**—See **BASTARDS**, <sup>3, 4</sup>; **EVIDENCE**, <sup>20, 30, 31, 33, 33, 34, 35, 36</sup>; **MUN. CORP.**, <sup>11</sup>; **PRAC.**, <sup>21, 22, 23</sup>.

**HEIRS**—See **ESTATES**, <sup>12, 13, 14, 15, 16</sup>.

**HIGHWAYS.**

**STREET RAILROADS**—*Bridges*—A bridge is not a part of a street nor does the term "pave" apply to the reflooring of the bridge, within a municipal ordinance requiring a street railway company to pave the space between the rails on any street which may, at any time, be paved or be ordered to be paved, by the city council, where bridges are named several times in the ordinance as distinct from streets, avenues, and highways.—*City of C. R. v. C. R. & M. C. Ry. Co.*, 406.

**HOMESTEAD**—See **INSUR.**, <sup>6</sup>; **MTGES.**, <sup>16</sup>.

1. **Selection**—Under Code 1873, section 1994 (present Code, section 2977), providing that an owner's homestead must embrace the house used by him as a home, and that, if he has two or more houses thus used, he may select either as his homestead, the selection of a house not so used is unauthorized and void, and such



## HUSBAND AND WIFE

## TO

## INJUNCTIONS

selection does not constitute an abandonment of homestead rights in a house used as a homestead.—*Knorr v. Lohr*, 181.

**HUSBAND AND WIFE**—See DAMAGES, <sup>1</sup>, <sup>2</sup>; DEEDS, <sup>1</sup>, <sup>2</sup>; ESTATES, <sup>1</sup>, <sup>4</sup>.

1. **Public Lands—DOWER**—Where a married man moved on certain public lands, and entered the same under a land warrant, the dowerable interest of his wife attached, which could not be defeated except by conveyance or other execution or judicial sale, and the mere fact that a patent did not issue until after the husband alone had conveyed away the land is immaterial.—*Purcell v. Lang*, 198.
2. **Liability for Debt—SEPARATE ESTATE**—A wife's separate property is not liable for her husband's debts, even though part of it has been accumulated on account of the skill and time gratuitously given by the husband to its management.—*Deere, Wells & Co. v. Bonne*, 281.
3. **Personal Suits Between**—A wife cannot sue a husband on his personal contract, such as a note made him to her as payee, during coverture.—*Heacok v. Heacok*, 540.
4. **SAME**—Power to contract with her husband is not given by bestowing upon a married woman the power to make and enforce contracts to the same extent as if sole, since the husband's disabilities must also be removed, before a contract with him can be valid.—*Idem*
5. **SAME**—Code 1873, section 2211, providing that a wife may receive wages for her own labor, and sue therefor, and prosecute all actions for the protection of her rights and property, as if unmarried, gives the wife no right of action as against her husband.—*Idem*.
6. **PLEA AND PROOF**—In an action against her husband upon contract, plaintiff must both allege and prove that the contract is authorized, as that the matter in controversy relates to her separate estate, because her capacity to contract with him is deemed exceptional.—*Idem*.

**IMPEACHMENT**—See BASTARDS, <sup>1</sup>; EVID., <sup>26</sup>.

**INDICTMENT**—See INTOX. LIQ., <sup>13</sup>.

**INJUNCTIONS**—See CORPORA, <sup>2</sup>; INTOX. LIQ., <sup>5</sup>, <sup>9</sup>.

**Violation—Evidence**—In an action to enjoin defendant from building a partition fence between his house and that of plaintiff, some ten feet high, and within twenty inches from plaintiff's house, for the purpose of annoying the plaintiff and

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## INJUNCTIONS Continued

TO

INSURANCE

darkening his windows, and making his property undesirable a temporary injunction was obtained. Thereafter plaintiff set some posts next to the board fence nearest plaintiff's house, nailed scantlings to them on the side nearest the house, and nailed to the scantlings boards so as to make a high board fence, forty feet in length and about twelve feet high. Boards were nailed to the scantlings in such a manner as to form a kind of a roof along the greater part of the fence and boards were also nailed at the ends. *Held*, a violation of the injunction, though defendant claimed that the structure was not a fence, but a woodshed.—*Lake v Wolfe*, 184.

**INSTRUCTIONS**—See *APPEAL*, <sup>22</sup>; *ATTY. AND CLIENT*, <sup>2</sup>, <sup>3</sup>; *BASTARDS*, <sup>6</sup>; *BREACH OF PROMISE*, <sup>10</sup>; *CRIM. LAW*, <sup>14</sup>, <sup>15</sup>, <sup>16</sup>, <sup>18</sup>, <sup>19</sup>, <sup>20</sup>; *DAMAGES*, <sup>2</sup>, <sup>3</sup>; *MUN. CORP.*, <sup>9</sup>, <sup>10</sup>, <sup>11</sup>; *PRACT.*, <sup>19</sup>, <sup>23</sup>, <sup>24</sup>, <sup>25</sup>, <sup>26</sup>, <sup>27</sup>, <sup>28</sup>, <sup>29</sup>, <sup>30</sup>, <sup>31</sup>, <sup>32</sup>.

**Degree of Proof**—A statement that plaintiff must prove want of contributory negligence to the satisfaction of the jury is not a happy expression, but was probably not misleading in view of other instructions.—*Jerolman v C. G. W. Ry. Co.*, 177.

**INSURANCE.**

1. **Action on Policy**—*Beneficiary*—One to whom a policy of insurance is issued, may maintain an action thereon although the loss is made payable to the mortgagee, as his interest may appear.—*Smith v. Continental Ins. Co.*, 882.

**Agency**—See <sup>6</sup>, <sup>9</sup>, *post*.

**Application**—See <sup>16</sup>, *post*.

2. **Appraisalment**—*Condition precedent*—Code, section 1742, which provides that in an action on a policy of fire insurance the amount stated in the policy shall be *prima facie* evidence of the insurable value of the property at the date of the policy, but the company shall not be prevented from showing the actual value and any depreciation thereof before the loss occurred, that it shall be liable for the actual value of the property insured at the date of the loss unless such value exceeds the amount stated in the policy, and that, in order to maintain his action it shall only be necessary for the assured to prove the loss of the building insured, does not fix the value of the property destroyed, and therefore render inoperative a provision in a policy that makes an appraisalment a condition precedent to a right of action on it.—*Zulesky v. Home Ins. Co.*, 841.

**Conditions Precedent**—See <sup>24</sup>, *post*.

## INSURANCE Continued

Construction of Pleading—See <sup>17</sup>, *post*.

Contracts—See <sup>1</sup>, *ante*

Defenses—See <sup>16</sup>, *post*.

3. Election to Rebuild—*Jury Question*—It is error to submit to the jury the question whether an insurance company can rebuild and replace the destroyed building for the amount of the insurance thereon, after deducting the difference in value between the new building and the old, where it appears by the uncontradicted evidence that the company had an offer from responsible contractors who were willing and able to give bonds, for the faithful performance of their contracts, to erect the building for \$400.00 less than the amount of insurance.—*Zalesky v. Iowa State Ins. Co.*, 392.

Estoppel—See <sup>9</sup>, <sup>10</sup>, <sup>12</sup>, *post*.

4. Evidence—*Admission of Insured*—In an action on a life insurance policy, where the defense is fraudulent misrepresentations as to health, the insurer may prove statements made by insured touching his health at about the time of, before, and after the issuance of the policy.—*Welch v. Union Cent. Life Ins. Co.*, 224.
5. SAME—Letters in the name of an insurance company and signed in its name by one who assumes to be its general adjuster, written in response to letters written by the company with reference to a loss, will be presumed to have been duly authorized by the company.—*Smith v. Continental Ins. Co.*, 382.
6. Forfeiture—*HOMESTEAD*—A policy of insurance on real property having a provision that it shall be null and void if the property becomes mortgaged or incumbered, is not forfeited where the insured property is a part of the homestead.—*Idem*.
7. NOTICE OF SUSPENSION—Where insurer mailed a notice in a registered letter, on which he requested a return if not delivered within fifteen days, and, because of its return, insured did not receive it, the policy was not suspended, though, in returning it, the postmaster violated the regulation requiring registered letters to be kept at the delivery postoffice thirty days.—*Idem*.
8. *Same*—A notice by an insurer, who had issued two policies to one person, stating the aggregate amounts required to cancel both policies and to pay the premiums due on both, was insufficient to suspend one of the policies.—*Idem*.
9. Fraud—*ESTOPPEL*—Under McClain's Code, section 1759, providing that the certificate of health issued by an insurance com-

## INSURANCE Continued

- pany's medical examiner shall estop the company from setting up the defense that the assured was not as healthy as required by the policy when issued, "unless the same" was procured by fraud, the company may set up the defense that the certificate, and thereby the policy, was secured by fraud, regardless of whether the examiner was deceived.—*Welch v. Union Cent. Life Ins Co*, 224.
10. SAME—A life insurance policy providing that it "shall be incontestible for any cause except misstatement of age," may nevertheless be contested for fraud entering into it.—*Idem*.
11. CERTIFICATE OF EXAMINER—Under Code, section 1812, providing that an insurance company whose examining physician certifies that an applicant is a fit subject for insurance shall be estopped to set up the assured was not in the condition of health required by the policy when issued or delivered, unless the same was procured by fraud or deceit of assured, a company whose physician so certifies cannot set up the falsity of warranties made by assured as to his condition, where the physician was not misled or deceived.—*Weimer v. Economic Association*, 451.
- Homesteads—See <sup>6</sup>, *ante*.
- Judgment on Pleadings—See <sup>15</sup>, *post*.
- Mortgages—See <sup>1</sup>, *ante*.
- Notice—See <sup>7</sup>, <sup>8</sup>, *ante*; <sup>18</sup>, *post*.
- Payment—See <sup>28</sup>, *post*.
12. Pleading—*Selling out Insurance Application*—Under Acts Eighteenth General Assembly, chapter 211, section 2, providing that insurer cannot, in an action on a policy, plead or prove the application therefor, unless it be attached to the policy, an answer, in an action on a policy, setting up fraud in the application therefor, is insufficient unless it shows that the application was attached to the policy.—*Parker v. Des Moines Life Association*, 117.
13. JUDGMENT UPON—Where the answer, in an action on a policy, contains a general denial and a denial of plaintiff's ownership, it is error to summarily enter judgment upon the pleadings, without proof of plaintiff's claim.—*Idem*.
14. DEFENSES—Where insured, suing for a loss, alleges compliance with the policy and the law, the insurer, in order to avail himself of the defense that insured failed to submit to an appraisal as required by the policy, must specially allege such fact.—*Smith v. Continental Ins. Co.*, 382.

## INSURANCE Continued

15. **DENIAL**—*Construction of*—An answer in an application on a life policy does not deny the death of assured by merely denying that he died on the day stated in the complaint, his death being admitted in other portions of the answer.—*Parker v. Des Moines Life Assn.*, 117.
  16. **PROOF OF LOSS**—A plaintiff may plead both a waiver of proof of death by defendant and the giving of proof by plaintiff.—*Stephenson v. Banker's Life Assn.*, 687.
  17. **Plea and Proof**—*McClain's Code 1888, section 1734*, providing that the assured shall give the company or association notice in writing of the loss, accompanied by an affidavit stating the facts as to how the loss occurred, applies to mutual benefit associations; and hence, where the giving of due notice is pleaded, and denied by the answer, plaintiff must prove, not only the giving of notice, but also the making of the affidavit.—*Parsons v. Grand Lodge A. O. U. W.*, 6
- Plea and Proof**—See <sup>19</sup>, *post*.  
**Presumptions**—See <sup>4</sup>, *ante*; <sup>25</sup>, <sup>26</sup>, *post*;  
**Proceeds**—See <sup>21</sup>, *post*.
18. **Proof of Loss**—See <sup>18</sup>, *ante*—*Sufficiency*—An affidavit of the undertaker who buried insured, which sets forth that he buried insured, and that insured died on a certain day, to his positive knowledge, is not such proof of death as is contemplated by Acts Eighteenth General Assembly, chapter 211, section 8.—*Stephenson v. Bankers Life Ass'n*, 117.
  19. **WAIVER**—The attorney for the beneficiary under a policy in a mutual benefit association wrote to the insurer, informing it of the death of the insured, and asking what was needed by way of proofs. The insurer replied that the insured had been suspended for nonpayment of dues, and that, if the attorney "understood the laws of Iowa governing this class of insurance, you 'he would undoubtedly hesitate to have taken any action in the case without further evidence." *Held*, a waiver of proofs of death, but one not available because not pleaded.—*Parsons v. Grand Lodge A. O. U. W.*, 6.
  20. **SAME**—An insurance company has power to waive proof of loss notwithstanding the stipulation in the policy that no agent or employe of the company or any other person or persons than the general manager of western department, shall have authority to waive or alter any of the terms or conditions of the policy.—*Smith v. Continental Ins. Co.*, 382.

**Rebuilding**—See <sup>3</sup>, *ante*.

## INSURANCE Continued

21. **Right to Proceeds**—Under a policy insuring a dwelling house and household furniture against fire, in which the insurer consents that the loss on buildings shall be payable to the mortgagee as his interest may appear, the insurance on the personalty belongs to the insured.—*Smith v. Continental Ins. Co.*, 882.
22. **Suicide**—The suicide of insured, not in pursuance of a preconceived intent existing when the policy was taken out, does not, in the absence of a provision for forfeiture in such case, constitute a defense as against the beneficiary named in the policy, and the fact that the company was organized under chapter 65, Twenty-first General Assembly and, therefore, the assured had a right with the permission of the company to change the beneficiary without the original beneficiary's consent does not change the rule, the policy benefit being taken by contract and not inheritance, and no change of beneficiary having been made.—*Parker v. Des Moines Life Association*, 117.
23. **SAME**—A secret intent on the part of insured at the time of taking out a policy on his life to commit suicide, vitiates the policy even as against the beneficiary named therein although there is no provision for forfeiture in case of suicide.—*Idem*.
24. **PRESUMPTIONS—Evidence**—The presumption is that a killing was accidental, and not suicidal, where the evidence is circumstantial and compatible with either theory.—*Stephenson v. Bankers Life Association*, 637.
25. **Same**—Evidence held insufficient to overcome the presumption that a death was caused by accident rather than by suicide.—*Idem*.
26. **Surrender of Policy—Condition Precedent**—In an action on a policy which provides that the insurance shall be paid on presentation of the policy, with satisfactory proof of death, it is not necessary to show a tender of the policy before commencement of the suit.—*Stephenson v. Bankers Life Association*, 637.
- Suspension**—See <sup>1</sup>, <sup>2</sup>, *ante*.
27. **Venue**—Under Code 1873, section 2584, providing that insurance companies may be sued in any county in which their principal place of business is kept or in which the contract of insurance is made, a company is not entitled to have a cause, commenced in the county in which the contract was made, transferred to the county in which the principal place of business is kept.—*Teller v. Equitable M. L. A.*, 17.

**Waiver**—See <sup>1</sup>, <sup>2</sup>, *ante*; <sup>22</sup>, *post*.

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TO

INTOX LIQUOR.

28. *Payment After Loss*—Offer by insured, after loss, of premium, which insurer refused to accept, and which insured knew, before the loss, was due and unpaid, gives him no right to recover.—*Smith v. Continental Ins Co.*, 382.
29. EVIDENCE OF—Evidence held sufficient to show proof of loss was waived.—*Stephenson v. Bankers Life*, 637.

INTEREST—See ACCOUNT STATED; CONTRACTS, "1"; TAXAT, "4.

INTERROGATORIES—See PRACT., "3", "4.

## INTOXICATING LIQUOR.

1. *Appeal—Misconduct of Jurors*—A conviction of unlawfully transporting intoxicating liquors within the state will not be disturbed on appeal on the ground of misconduct of certain jurors in drinking the contents of one of the bottles of beer transported by defendant, after the verdict was found, reduced to writing and signed by the foreman.—*State of Iowa v. Reilly*, 785.
2. *CONTEMPT—Review*—The Supreme Court may, upon *certiorari* to review an order dismissing an application to punish the violation of an injunction as a contempt, inquire whether the injunction was violated, notwithstanding that the district judge found that a contempt had not been committed.—*Hawks v. Fellows*, 188.
3. *Contempt*—One engaged as a bartender in carrying on the business of illegal liquor selling can be found guilty of contempt in violating an injunction in a decree forbidding the further continuance of the business.—*Idem*.
4. *SAME*—The payment by a saloonkeeper of the tax required by Acts Twenty-fifth General Assembly (Mulct Law) does not relieve his bartender from the charge of contempt of an injunction restraining both of them from selling liquors where prior to the sale in question the conditions of the act had been violated by sales to minors, which violation by section 19 removed the protection afforded by the act, although the sales to the minors were made by the saloonkeeper and not by the bartender.—*Idem*.
5. *INJUNCTION—Service of Writ*—Where defendants enjoined were in court by attorney when the decree of injunction was rendered, they are chargeable with knowledge of its contents; and the decree need not be served upon them, to render them guilty of contempt for violating the same.—*Idem*.

## INTOX. LIQ. Continued

6. **Illegal Sale of Liquor—BILLS OF LADING**—A banker selling bills of lading at his bank to whoever might apply, thereby enabling the purchasers to obtain intoxicating liquors at a freight depot, is guilty of selling the liquors; such dealings precluding him from asserting that he was a mere collecting agent for the consignors of the liquors.—*State of Iowa v. Snyder*, 205.
7. **ILLEGAL TRANSPORTATION—Statute Construed**—Under a statute prohibiting "any common carrier or person" from transporting liquor, an individual engaged in the liquor traffic may be convicted, though not a common carrier.—*State of Iowa v. Reilly*, 735.
8. **EVIDENCE**—Most, if not all, of six applicants for the purchase of intoxicants had been seen intoxicated, some or them more than once. Four had been arrested and punished for drunkenness. The seller admitted having seen one of them drunk before he sold to him, and he had heard of another being drunk and had refused to sell him liquor. The testimony opposing was of a negative character only. *Held*, that they were addicted to the use of intoxicants as a beverage, and the sales to them were illegal.—*Harlan v. Richmond*, 161.
9. *Same*—Where in an action to enjoin a liquor nuisance, plaintiff introduces an affidavit of one alleging that he was an employe in defendant's saloon, and that the owner was conducting the place in compliance with the mulct law, plaintiff is bound thereby, so far as it is not shown to be untrue by other evidence.—*Hawks v. Fellows*, 138.
10. **Jury Question**—Where accused admits a sale of pepsin bitters after notice not to sell intoxicants to the person in question, and a witness testifies that pepsin bitters is intoxicating, the question is for the jury whether the sale is within Code, section 2448, subdivision 11, prohibiting the selling of intoxicants to any person whose relatives have by written notice forbidden such a sale.—*State of Iowa v. Bussamus*, 11.
11. **PRESUMPTION**—Where a pharmacist sells in two months on 19 different days to one man, and on 30 to another, whisky and alcohol by the half pint, and makes similar sales to others, some of whom drank intoxicants as a beverage and became intoxicated, the presumption of illegal sales is authorized, which is not overcome by reputation that the business was lawfully conducted, and by each purchaser signing the statutory statement that he did not habitually use liquor as a beverage, and that it was for medicinal use.—*Hall v. Coffin*, 466.



## INTOX. LIQ. Continued

12. **PLEA AND PROOF**—Where a petition to enjoin the sale of intoxicants charges a continuing offense, evidence of illegal sales *post litem motum* is competent.—*Idem*.
13. **INDICTMENT—SUFFICIENCY**—An indictment for unlawfully transporting intoxicating liquors within the state, in the language of the statute which describes the offense, is sufficient.—*State of Iowa v. Reilly*, 735.
14. **NUISANCE—CESSATION BEFORE ACTION**—An action to enjoin a liquor nuisance will not lie where the evidence is uncontradicted that, for some time prior to the beginning of the action, defendant had ceased to sell liquor. In this case no stock of liquors was retained and no government tax paid.—*Sharp v. Arnold*, 203.
15. **DEFENDANT OWNING NEITHER LIQUOR OR BUILDING**—He is also guilty of maintaining a nuisance defined as using a building in which intoxicating liquors are sold unlawfully, though he owned neither the building nor the liquors.—*State of Iowa v. Snyder*, 205.
16. **MULOT LAW—"SINGLE ROOM"**—A room fronting on a street, with a door opening out on it, and another door leading to another room, in which are stored the liquors sold in the former, is not "a single room having but one entrance."—*State of Iowa v. Bussamus*, 11.
17. **CONSENT—Population of Cities—Best Evidence**—The official register of the state is conclusive evidence as to the number of inhabitants in the city for which the petition is filed.—*In re Sale Intoxicating Liquors*, 368.
18. **SALE FOR TAX—Essential Prerequisites**—A sale for a mulot tax is void, where the supervisors failed to levy tax, as required by Acts Twentieth General Assembly, chapter 62, section 9.—*Smithberg v. Archer*, 215.
19. **PERMIT LAW CONSTRUED**—Acts Twenty-third General Assembly, chapter 35, section 10, defines the cases in which a permit holder may lawfully sell intoxicants, and requires him to refuse unless he has reason to believe the applicant's statements are true, "and in no case" unless he personally knows the applicant, and that he is not intoxicated nor in the habit of using intoxicants as a beverage, nor a minor, etc. *Held*, that though the phrase introduced by the words "and in no case" lacks a verb, and something must be supplied to make the meaning clear, yet the limitation expressed is on the right to sell, and the seller must know the applicant, and that he is not a minor, nor in the habit of using intoxicants as a beverage, etc.—*Harlan v. Richmond*, 161.

JUDGMENTS

TO

LIBEL

**JUDGMENTS**—See APPEAL, <sup>10, 26, 27</sup>; CONTRACTS, <sup>2</sup>; ESTATES, <sup>12, 13, 14, 15</sup>; INSUR., <sup>12</sup>; PRACT., <sup>5, 26, 27</sup>.

1. **Conversion of—RIGHTS OF COLLATERAL HOLDER**—Where a judgment is assigned as collateral security for an indebtedness in a sum less than the face of the judgment, the assignee cannot maintain an action for conversion against an officer because of a levy and sale of the judgment, subject to the assignment, under an execution against the judgment plaintiff.—*Baker v. Mills*, 490
2. **Satisfaction**—Conveyance by a judgment debtor of his equity of redemption in land sold under the execution issued thereon, and redemption by his grantee, is not a satisfaction of the judgment, or recognition of its validity by the judgment debtor. *Schoonover v. Osborne*, 453.

**JURISDICTION**—See BENEFIT ASSOCIATIONS, <sup>1, 2</sup>; PRACT., <sup>25</sup>.

**JURORS**—See CRIM. LAW, <sup>20, 21, 22</sup>; INTOX. LIQU., <sup>1, 2</sup>.

**JURY**—See APPEAL, <sup>25</sup>.

**JURY QUESTION**—See AGENCY, <sup>7</sup>; ATT'Y AND CLIENT, <sup>4</sup>; CRIM. LAW, <sup>10, 22, 23</sup>; ELECTIONS, <sup>9, 11, 12, 13</sup>; INSUR., <sup>2</sup>; INTOX. LIQU., <sup>10</sup>; MASTER AND SERVANT, <sup>1</sup>; MUN. CORP., <sup>2, 12</sup>; NEGLIGENCE, PRACT., <sup>10</sup>; RAIL., <sup>8, 11</sup>; SETTLEMENTS, <sup>2</sup>.

**JURY TRIAL**—See CONSTITUTIONAL LAW, <sup>1</sup>; PRACT., <sup>22, 40, 41, 42</sup>.

**LABOR LIENS**—See LIENS, <sup>1</sup>.

## LANDLORD AND TENANT.

**REMOVAL OF IMPROVEMENTS**—The execution of a new lease, providing that the tenant should deliver the premises in as good condition as they were then in, does not deprive him of a right granted under a prior lease to remove improvements erected by him with the knowledge and consent of the lessor and which were removable without material injury to the realty; the occupancy being continuous under both leases.—*McCarthy v. Trumacher*, 281

**LAW OF SISTER STATE**—See CONTRACTS, <sup>12</sup>.

**LEGATEES AND DEVISEES**—See ESTATES, <sup>1</sup>.

**LEVY**—See ATTACH., <sup>1, 2, 3, 4</sup>.

**LEX LOCI**—See CONTRACTS, <sup>12</sup>.

## LIBEL.

1. **Plea of Justification**—A plea, to an action for libel, made as a complete defense to the charge of malicious intent, that "every fact charged in the publication as having been done by plaintiff was the truth, and in fact done as therein charged," is

## LIBEL Continued

## TO

## LIENS

bad, when acts with another are charged, in that it does not plead the truth of all the libelous charges.—*Clifton v. Lange*, 472.

2. **Mitigation—Demurrer**—A plea, in mitigation for damages for a libel, that the matters set forth in the publication were told defendant by others before the publication was made, is bad, on demurrer, where the libelous statement purports on its face to be made on the personal knowledge of the writer.—*Idem*.
3. **PRIVILEGE—Pub in Officer**—The publication of an attack upon the private character of a public official is not privileged.—*Idem*.
4. **Libel of the Dead—RIGHT OF ACTION BY MOTHER**—The publisher of a libel concerning an adult deceased person is not civilly liable to the mother of the deceased for shame, humiliation, and mental anguish suffered by her on account thereof.—*Bradt v. New Nonpareil Co.*, 449.

## LIENS — See TAXAT., 4.

1. **Labor—CHattel Mortgage — Priorities** — Where a steam thrasher is seized, and the business of the owner is suspended, by the holder of a purchase-money mortgage, a claim of the engineer for labor performed after the execution and recording of the mortgage is a preferred claim.—*Goodenow v. Foster*, 502.
2. **Mechanic's Lien**—The owner of the land contracted with another to sell the land. The purchaser agreed to pay a part of the price on delivery of the deeds, and to secure the balance by a mortgage, to be junior to another mortgage to be placed thereon by the purchaser, not to exceed \$1,500, to secure funds with which to pay for improvements which he agreed to make. The purchaser did not make the first payment, but with the consent of the owner, made the improvements, but did not negotiate the mortgage. *Held*, that persons furnishing material and labor in making such improvements are entitled to a lien on the premises to an amount not exceeding \$1,500.—*Janes v. Osborne*, 409.
3. **ASSIGNMENT OF CONTRACT**—An assignee of a contract for the erection of a creamery who furnished the material and performed the labor is entitled to a lien for the amount due either as a contractor or as a sub-contractor, where nothing was paid to the original contractor who has waived all claim under the contract, and no part of the work was done by him under the contract.—*Haney & C. Co. v. Adaza C. Co.*, 313.

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## LIENS Continued

## TO

## LIM. OF ACTIONS

4. **BUILDINGS—Owners**—Provisions of laws, Sixteenth General Assembly, chapter 100, section 10, that every person for whose immediate use or benefit any building, erection, or other improvement, is made, having the capacity to contract, shall be included in the word "owner," is not a limitation upon section 8, giving a lien for labor or material furnished for any building or other improvement upon land by virtue of any contract with the owner; but extends the definition of the term "owner" so as to include persons who would not ordinarily be held to come within its meaning.—*Janes v. Osborne*, 408.
5. **Vendor and Purchaser**—A vendor is not entitled to a prior lien for the amount of the purchase price which was to have been paid in cash at the time of the contract, but which was never paid, over a mechanic's lien for labor and material furnished in the erection of a house thereon by the purchaser under such circumstances as to make the lien attach to the land as well as to the building, where the contract shows that the vendor did not intend to reserve any lien for such amount, but expressly gave the cost of the house priority to his claim for purchase money.—*Idem*.

LIFE TABLES—See EVID., ".

### LIMITATION OF ACTIONS—See FRAUD. CONV.,<sup>2</sup>; TAXAT.,<sup>1,2</sup>.

1. **Change of Statute**—A new statute shortening the time of limitations will not bar a recovery on a cause of action which would be barred at the time of its passage according to the shortened term, until the lapse of a reasonable time in which to commence the action.—*Cassady v. Grimmelman*, 695.
2. **Guardian's Bond—Tolling Statute**—When a ward becomes of age, the statute of limitations commences to run against a cause of action on the bond of his guardian for failure to account, whether or not demand for an accounting be made, and whether or not the guardian be ordered to account by the court; and the statute of limitations is not tolled by the death of a person after the statute has commenced to run against a cause of action in his favor.—*Ackerman v. Hilpert*, 247.
3. **Tax Titles—Attornment**—The statute of limitations does not bar the holder of a tax title from enforcing his claim, if the holder of the fee makes a written surrender and attornment to him before the statute has run.—*Gallaher v. Head*, 588.

MAL. PROS.

TO

MASTER AND SERV.

**MALICIOUS PROSECUTION.**

1. **Evidence**—Where, in an action for maliciously prosecuting plaintiff for shooting defendant, plaintiff testified that he shot defendant in self defense as he was coming on plaintiff's premises through the gateway or over the fence, it was error to exclude defendant's evidence in support of his denial that he was advancing on plaintiff, showing where that portion of the charge of shot which missed him struck the fence; this tending to prove that he was sixty or sixty-five yards distant from the gate, down the road.—*McAllister v. Johnson*, 42.
2. **SAME**—Where plaintiff in action for malicious prosecution testified that defendant at the time of shooting, out of which the prosecution arose, said, "I am on the ground that I was when I shot at you two years ago," defendant was properly not allowed to strengthen his denial of this statement by showing the facts as to the former difficulty.—*Idem*.
3. **JUDGMENT FOR COSTS.** Under Code 1873, section 4292, requiring an indictment found at the instance of a private prosecutor to be indorsed with such person's name, and authorizing the court to award costs against him if satisfied that the prosecution was malicious or without probable cause, if the name be not so endorsed, the judgment awarding costs is void, and is not admissible against such person in an action for malicious prosecution.—*Idem*.
4. **Plea and Proof**—**ADVICE OF COUNSEL**—In an action for malicious prosecution, advice of counsel, as tending to disprove malice and want of probable cause, may be shown under general denial.—*Idem*.

**MASTER AND SERVANT**—See **PLEA AND PROOF**, 1; **RAIL.**, 1, 2.

1. **Assuming Risk of Employment**—*Jury Question*—An employer reversed an elevator cable, and informed his employe that the elevator was fit to use, but not to use it for the top floors, unless obliged to do so. While conveying freight to an upper floor, the elevator fell, injuring the employe. *Held*, that whether or not he assumed the risk incident to the defective cable was for the jury.—*Stomne v. Hanford Produce Co.*, 137.
2. **SAME**—The essential element of the assumption of a risk by a servant of the danger from the defective cable of an elevator, that he appreciated the danger, cannot as a matter of law, be inferred from his knowledge of the defect where he was informed by the superintendent that it was safe enough

MASTER AND SERV. Continued TO MORTGAGES

to use for the rest of the season and the latter rode upon the elevator with the servant only the day before the accident.—*Idem*.

3. SAME—The doctrine of the assumption of risk involves two elements; knowledge of the defect and appreciation of the danger.—*Idem*.

MECHANICS LIENS—See LIENS, <sup>2</sup>, <sup>3</sup>, <sup>4</sup>, <sup>5</sup>.

MINORS—See CRIM. LAW, <sup>22</sup>.

MORTALITY TABLES—See EVID., <sup>41</sup>.

MORTGAGES—See BANKS, <sup>4</sup>, <sup>5</sup>, <sup>6</sup>, <sup>7</sup>; REDEMPTION; TAXAT., <sup>10</sup>, <sup>11</sup>.

1. **Assuming Mortgage**—Where the seller of land covenants against encumbrances, the covenant is breached and damage shown if a mortgage exists even though the buyer sells again and the last grantee assumes such mortgage.—*McLaughlin v. Royce*, 254.
2. **TENDER**—A grantor was entitled to a reconveyance on payment of \$1,500, but, before tender, the land was sold to a third person, who assumed a mortgage of \$600. *Held*, that the latter was not obliged to accept a tender of \$1,000.—*Idem*.
3. **Attaching Creditors**—Where an attaching creditor purchases a prior chattel mortgage, and has the same assigned to him, it is not payment of the mortgage, within Acts Twenty-first General Assembly, chapter 117, providing that attaching creditors may take possession of mortgaged chattels upon paying the mortgage debt —*Webster City Grocery Co. v. Losey*, 687.
4. **SAME**—The fact that attached property was sold in bulk instead of at retail and for much less than it was actually worth will not avoid the sale as illegal and fraudulent although more money might have been received for the goods by a retail sale of them, where it is doubtful if more money would have been realized by the creditors because of the additional expense of closing out the stock in such a manner.—*Idem*.
5. **SAME**—An attaching creditor is not precluded from purchasing a prior mortgage lien upon the property attached and paying the mortgage debt, leaving to his attachment any surplus, by Acts Twenty-first General Assembly, chapter 117, providing that attachment creditors may take possession of mortgaged chattel property by paying or tendering the holder of the mortgage the amount of the mortgage debt. on the ground that such act extinguished the debt, and the remedy left to the attaching creditor was to pursue the course prescribed by

**MORTGAGES. Continued**

- the act under the attachment, since the statute makes no provision for an assignment or purchase of a mortgage in such cases but merely for paying or tendering payment.—*Idem*.
6. **Construction**—A chattel mortgage on the fixtures and furniture in a store, used in carrying on a merchandise business, includes a safe. — *Tollerton & Stetson Co. v. Anderson*, 217.
  7. **BOOK ACCOUNTS**—*Expense of Collection*—Where a chattel mortgage on book accounts authorized the mortgagee to collect them, and the latter employed an agent to do so, the agent's reasonable commissions for making the collections were properly allowed as expenses of the foreclosure.—*Idem*.
  8. **Deeds as Mortgages**—Defendant and mortgagor agreed that defendant should procure an assignment of the mortgage, the mortgagor to furnish part of the consideration, and foreclose it, and within a year thereafter the mortgagor, was to repay him the amount advanced to procure the assignment, whereupon he was to assign to her the certificate of sale. Defendant procured an assignment of the mortgage, foreclosed it, and bid in the premises in his own name, but the mortgagor failed to repay him the amount advanced within the time specified, and a sheriff's deed to the premises was issued to the defendant. *Held*, that defendant held the title to the property only as security for the money advanced by him. *Harrington v. Foley*, 287.
  9. **POSSESSION**—Under Code, 1873, section 1938, providing that the mortgagor of real property shall retain the legal title and right of possession, the holder of the absolute title in fee to lands as security for a loan is not entitled to possession.—*Idem*.
  - 10 **Foreclosure of Chattel Mortgage**—**SALE AT RETAIL**—Under a chattel mortgage on a stock of merchandise authorizing a foreclosure by private sale either in bulk or by single article, the mortgagee may, in the absence of bad faith, sell at retail in the ordinary course of business.—*Tollerton & Stetson Co. v. Anderson*, 217.
  11. **ATTORNEY'S FEES**—Where a mortgage provided for attorney's fee in case of foreclosure, such fee was properly included in the decree.—*Guaranty S. & L. Assn. v. Ascherman*, 150.
  12. **SUBSEQUENT MORTGAGEE**—*Extinguishment*—A subsequent mortgagee purchased the first mortgage, which he foreclosed, and bought the property for the amount of the decree, etc., without making any reference to subsequent mortgages held by him, in foreclosing or selling. He made no attempt to redeem from himself and accepted redemption money on the

MORTGAGES. Continued

TO

MUN. CORP.

- first mortgage sale. *Held*, that the lien of such mortgages was thereby extinguished, and that a purchaser of the mortgagor's equity of redemption was entitled to their release on payment of the amount due upon the foreclosure decree—*Wells v. Ordway*, 86.
13. **Junior—ESTOPPEL**—A junior chattel mortgagee cannot complain that the senior mortgagee, in foreclosing, sold the goods for country produce instead of for cash, where the produce was converted into cash and credited.—*Tollerton & Stetson Co. v. Anderson*, 217.
  14. **SAME**—Where a junior chattel mortgagee advised the senior mortgagee in foreclosing to keep up the stock, and sold to him merchandise to be resold in connection with the mortgaged goods, he cannot complain of the senior mortgagee's making purchases and reselling in connection with the sale of the mortgaged stock; and, at any rate, cannot thereby obtain priority, or have the senior mortgage invalidated.—*Idem*.
  15. **Proceeds—APPLICATION**—Where a husband's creditor knowingly receives the proceeds of the sale of lots mortgaged by the wife to secure the debt, he must apply them on the mortgage.—*Heaton v. Ainley*, 112.
  16. **Release of Homestead—MARSHALLING ASSETS**—A junior chattel mortgagee was not prejudiced by the senior mortgagee releasing a mortgage for the same debt on the mortgagor's homestead, because resort to the homestead to satisfy the debt would not have been permitted until after the exhaustion of the other security.—*Idem*.
  17. **Validity—ESTOPPEL TO DENY**—One party defending against a mortgage alleged that it was collateral, and demanded a marshalling of securities; another being substituted for him, adopted his answer, and further admitted the mortgage appeared of record, and averred that it was without authority, and void. *Held*, that the parties were not estopped by their answer to deny the validity of the mortgage—*Waughtal v. Kane*, 268.
  18. **DELIVERY—Estoppel**—A junior chattel mortgagee, whose mortgage is by its terms made subject to the senior mortgage, cannot complain that the latter was not delivered until after his own had taken effect.—*Tollerton & Stetson Co. v. Anderson*, 217.

MOTION NON OBSTANTE—See APPEAL, 27.

**MUNICIPAL CORPORATION—TAXAT., 2, 4, 5.**

1. **Negligence—SIDEWALKS—Tricycle**—One injured while riding a tricycle on a sidewalk can recover only if the city was negli-

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## MUN. CORP.—NEGLECT.—Continued

gent in failing to keep the sidewalk in suitable condition for people to walk over, and he, while riding the tricycle, exercising due care, was injured because of such neglect.—*Wheeler v. City of Boone*, 235

2. JURY QUESTION—Whether or not a city was negligent in not anticipating and providing against the discharge of water upon a sloping sidewalk and its freezing there is for the jury upon evidence that for several years water had been discharged upon the walk through a hole in a neighboring fence cut for that purpose and that, at the time of the accident, and for several hours before, the temperature was so low as to freeze water and that early the following morning there was a body of ice directly in front of the hole which was about three feet wide near the hole narrowing to the outer edge of the walk, where it was six inches to one foot in width.—*Shumway v. City of Burlington*, 424.
3. STREETS—The responsibility of a municipal corporation for the condition of its streets extends to natural defects and obstructions permitted to remain when the street is opened for public use, it being assumed for the purpose of this case that such responsibility does not attach where the defect is outside of so much of the street as is customarily used by the public.—*Lamb v. City of Cedar Rapids*, 629.
4. TEMPORARY SIDEWALKS—*Grad.*—Code of 1873, section 466, provides that the town council shall have power to construct sidewalks; and section 463 authorizes them to lay temporary sidewalks on the natural surface of the ground on a street not permanently improved. *Held*, that, where no permanent grade is established, the council cannot construct a temporary plank sidewalk above the natural surface, so as to bring it on a line with improvements on the street.—*Hartrick v. Town of Farmington*, 31.
5. EVIDENCE—*Sidewalks*—Evidence in an action against the city for injury from a defective sidewalk, that there was no change in the condition of the walk for a month after the accident, is admissible; there being other evidence as to the condition just after the accident.—*Baily v. City of Centerville*, 20.
6. SAME—Testimony in an action for personal injury, that plaintiff *looked but*, that apparently she could scarcely walk, and that she lifted her foot very tenderly, is admissible.—*Idem*.
7. *Same*—Admission of evidence as to the condition of a sidewalk two hundred feet from the place of the accident is not error; there being evidence that the walk for the distance of the

## MUN. CORP.—NEGLIG.—Continued

entire block within which the accident occurred was out of repair and in a dangerous condition.—*Idem*.

8. *Conclusion*—Testimony that from the time witness noticed the sidewalk till plaintiff was injured thereby, a period of six months, "it did not get in any better shape," is not a mere conclusion but an affirmation that there was no change in its condition.—*Idem*
9. *INSTRUCTIONS*—Where the evidence is that the sidewalk was continuously in bad condition for the entire block within which the accident happened, an instruction that the evidence to show that boards were loose in other places in the same block was to be considered only on the question of notice does not direct separate and distinct defects to be considered.—*Idem*.
10. *Same*—An instruction that the evidence tending to show that the sidewalk was out of repair a short distance from the accident was to be considered only "for the purpose of tending to show, if it does (and that is for you to say), whether or not" the city should, by the exercise of reasonable care, have had notice of the condition of the walk where the accident happened, does not assume a state of facts to exist, but leaves it to the jury to say whether the evidence tended to show that the city had notice of the defect causing the accident.—*Idem*.
11. *Harmless Error*—An instruction telling the jury not to consider the amount of sidewalk the city had to maintain is not prejudicial though there is no evidence regarding the matter.—*Idem*.
12. *Notice*—Where a city has sufficient notice of an alleged defect in a street, it is liable for injuries caused thereby, where it fails, in the exercise of reasonable care, to remove or remedy the defect.—*Lamb v. City of Cedar Rapids*, 629.
13. *KNOWLEDGE OF CITY—Jury Question*—Testimony that a defect in a sidewalk had existed for about two months and strong testimony on the part of persons who used the walk, and who ought to have known of a defect if it existed, that they did not know of it, leaves the knowledge of the city a jury question —*Wheeler v. City of Boone*, 235.
14. *Ordinance—CONSTRUCTION—Bicycle and Tricycle*—An ordinance against the use of sidewalks by "all varieties of vehicles known by the general term 'bicycles,'" or one providing that no one shall "lead, ride, or place any beast of burden or vehicle on any sidewalk," other than going in or out of premises, or one prohibiting riding or driving other than between the curb

## MUN. CORP.

## TO

## NOTES AND BILLS

lines of a street, has no application to a tricycle operated by hand for the convenience of one unable to walk.--*Idem*.

15. **Police Matron — SALARY — Ordinance and Statute** — In the appointment of a police matron, a city need not necessarily act under the provisions of Acts Twenty-fifth General Assembly, chapter 15; and if such appointment be made, instead, in pursuance of a city ordinance, and upon a salary fixed therein, the appointee cannot recover of the city the difference between the salary so fixed and that provided by the statute.—*Daniels v. City of Des Moines*, 484.

NAME—See CORPORATIONS, <sup>1</sup>.

**NEGLIGENCE**--See ATTY. AND CLIENT, <sup>2</sup>; CONTRACTS, <sup>12</sup>; MUN. CORP., <sup>1</sup>; RAIL., <sup>4</sup>, <sup>5</sup>, <sup>6</sup>, <sup>7</sup>, <sup>8</sup>.

1. **JURY QUESTION**—Where one, standing on a platform of a wind-mill 50 feet high and using an iron wrench weighing four pounds, drops it to the ground, where persons might reasonably be expected to be, and a person below is injured, the dropping of the wrench is of itself an act from which negligence may be inferred, and whether he used ordinary vigilance to avoid losing his grasp on the tool that injury might not be occasioned by its fall is a question for the jury, and where he is unable to explain how he happened to lose control of it a verdict against him will not be set aside.—*Armbright v. Zion*, 340.
2. **CONTRIBUTORY NEGLIGENCE**—After a defective elevator cable was reversed an employe was instructed not to use it for upper floors unless obliged to do so. A stairway and another elevator afforded access to the upper floors, but it was customary for employes moving freight to ride on the elevator as it saved time. In conveying freight to an upper floor, the elevator fell, injuring an employe. *Held*, that the question of his negligence was for the jury.—*Stomne v. Hanford Produce Co.*, 137.

**NEW TRIAL**—See APPEAL, <sup>28</sup>; BASTARDS, <sup>1</sup>; CRIM. LAW, <sup>22</sup>; PRACT., <sup>43</sup>, <sup>43</sup>, <sup>44</sup>, <sup>45</sup>, <sup>46</sup>, <sup>47</sup>, <sup>48</sup>, <sup>49</sup>, <sup>50</sup>, <sup>51</sup>, <sup>52</sup>.

**NON OBSTANTE VEREDICTO**—See APPEAL, <sup>27</sup>.

**NOTES AND BILLS**—See ATTACH., <sup>2</sup>; CONTRACTS, <sup>2</sup>.

1. **Alteration of Instruments**—Where it is expressly agreed that the rate of interest on a note shall be changed from seven to eight per cent., the payee can make the alteration on the note without affecting its validity, though without the knowledge of the payer.—*Phillips v. Crips*, 605.

## NOTES AND BILLS Continued

2. **Gambling Contracts—Consideration**—A person indebted to a bucket shop for margins on options gave a check drawn in favor of himself and endorsed in blank to one of the proprietors, who cashed it at a bank, and gave the money to his partner. Payment being refused by the drawee bank, it was returned to the bank where it had been cashed, and taken up with the note of the drawer, payable to the order of one of the bucket shop proprietors, and endorsed in blank. *Held*, that a finding that in cashing the check, the bucket shop proprietor did not act as the drawer's agent, that the alleged debt was not paid by the giving of the check, and that, therefore, the note was given in payment of a gambling transaction, and hence was void, was warranted.—*People's Savings Bank v. Gifford*, 277.
3. **SAME**—A note given in settlement of a balance growing out of bucket shop transactions in which no delivery of the property dealt in was made or contemplated, is void.—*Idem*.
4. **CHECKS—Payment**—The note was not purged of its illegal consideration by the fact that a third person signed it as surety, and its payee was not the same as the payee of the check, and, that by giving it, an extension for the payment of the alleged debt was procured.—*Idem*.
5. **Same**—The acceptance of a check payable to the drawer or bearer, and endorsed in blank, does not, in the absence of an express agreement, constitute a payment of the debt.—*Idem*.
6. **Payment—Evidence**—A holder of a note procured from a bank which had marked it "Paid." with a cancellation stamp has the burden of proving that he bought the note, the stamp being presumptive evidence of payment.—*Riddle v. Russel*, 591
7. **SAME**—One who has paid a promissory note, although for the benefit of the maker, cannot sue upon it.—*Idem*
8. **SAME**—A stranger accepting a note from the bank which had marked it "Paid" after he paid its amount to the bank, without anything being said about his purchasing it, cannot recover from a surety thereon.—*Idem*.
9. **Price of Notes—Presumptions**—An agreement to purchase "four notes," each given for a sum stated, is an undertaking to pay therefor the face value thereof.—*Ubbinga v. Farmers Savings Bank*, 221
10. **Savings Banks—DEBT—Powers**—Under McClain's Code, section 1790, authorizing savings banks to purchase notes, such a bank can make a contract for the purchase of notes, assuming such a contract to be a debt, notwithstanding a statutory

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provision prohibiting such banks from contracting any debt except for deposits and necessary expenses of management.—*Idem*.

11. **Sureties**—One endorsing a note merely as a surety is not liable thereon where it is void as against the maker.—*Peoples Savings Bank v. Gifford*, 277.

**NOTICE**—See **MUN. CORP.**, <sup>13</sup>, <sup>12</sup>; **SALES** <sup>4</sup>.

**NUISANCES**—See **DAMS** <sup>2</sup>; **INTOX. LIQ.**, <sup>14</sup>.

**OFFER TO COMPROMISE**—See **EVID.**, <sup>1</sup>.

**ORDINANCES**—See **EVID.**, <sup>20</sup>; **MUN. CORP.**, <sup>14</sup>, <sup>15</sup>.

**PARTIES**—See **ESTATES**, <sup>14</sup>.

**PARTNERSHIP**—See **CONTRACTS**, <sup>1</sup>, <sup>20</sup>.

1. **Law Partners as Obligors**—**SCOPE OF BUSINESS**—An agreement by a partner in the name of his firm, engaged in the practice of law, to save a surety harmless if he would execute a bond in a case in which the firm was engaged, being outside the scope of the partnership business, is not binding on a partner who did not authorize or ratify the signature.—See *Berger v. Wyman*, 527.
2. **EVIDENCE OF AUTHORIZATION BY PARTNER**—A partner in a law firm executed an agreement, in the name of the firm, to indemnify a surety if he would execute bond in a case in which the firm was engaged. Another partner had control of the litigation, but testified that he did not know of the instrument until after it was given. The former testified that he obtained the surety at the latter's request, and that they discussed the matter before and after the security was given. The principal was unable to secure the bond, and applied to the firm to obtain it, and it was agreed that he would pay them to do so. *Held*, sufficient to charge such partners with liability.—*Idem*.

**PAYMENT**—See **NOTES AND BILLS**, <sup>4</sup>, <sup>5</sup>, <sup>6</sup>, <sup>7</sup>, <sup>8</sup>, <sup>9</sup>; **PLEAD.**, <sup>6</sup>.

1. **Application**—Where an open, running account with a firm is continued unchanged with a member who buys the interest of his co-partner and continues the business, the rule that payments on such an account will be applied to satisfy the oldest items thereof applies to payments made thereon to the firm's successor.—*Schoonover v. Osborne*, 453.
2. **SAME**—Where a surety pays the note, but the maker, having no knowledge thereof, gives a new note to the surety, with the understanding that it is in lieu of the former and is to be discounted at a bank, and the proceeds applied to the former, payments made by the maker of the second note should be applied on the first one.—*Heaton v. Ainley*, 112.

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PLEA AND PROOF

TO

PLEADINGS

3. **SAME**—A creditor receiving a payment without instructions may apply it on any claim he chooses.—*Idem*.

**PERSONAL TRANSACTIONS WITH DECEDENT**—See **ESTATES**,<sup>4,5</sup>,

**PLEA AND PROOF**—See **MAL. PROS**,<sup>4</sup>.

1. Evidence that after a master's attention was called to a defect in an appliance he made certain changes and directed the servant to use it is admissible to avoid the inference of the assumption of risk from knowledge of such defect, although plaintiff filed no reply confessing the assumption of risk and avoiding the same, since the assuming of the risk pleaded in answer was denied by operation of law without a reply.—*Stomne v. Hanford Produce Co*, 137.
2. **SAME**—An allegation in an answer setting up a lack of authority on the part of the attorneys to commence the action is an affirmative defense, and is denied by operation of law, and the action would not abate until such want of authority was proven.—*State v. Beardsley*, 396.
3. **Contracts, Express and Implied**—Plaintiff cannot recover on a petition showing an implied promise to pay for services when it appears that they were rendered under an express agreement, and a breach thereof, which would entitle plaintiff to recover on a *quantum meruit*.—*Duncan v. Gray*, 599.

**PLEADINGS**—See **APPEAL**,<sup>30, 33, 35, 36, 40</sup>; **DAMAGES**,<sup>9, 10</sup>; **ESTATES**,<sup>2</sup>; **EVID**,<sup>36</sup>; **HUSB. AND WIFE**,<sup>6</sup>; **INSUR.**,<sup>12, 14, 15, 16, 17</sup>; **INTOX. LIQU.**,<sup>12</sup>; **LIBEL**,<sup>1, 2</sup>; **PRACT.**,<sup>1, 5</sup>.

1. **Admissions**—Matter in reply, by way of confession and avoidance, does not dispense with proof of allegations of the answer which stand denied by operation of law. Whether such proof would be made by using the reply in evidence, is left undecided.—*Parsons v. Grand Lodge A. O. U. W*, 6
2. **SAME**—An averment that defendant, to enable the sheriff to maintain his attachment, procured an assignment of a chattel mortgage on attached property, which said transfer and assignment were made under Acts Twenty-first General Assembly, chapter 117, was admitted by the answer. *Held*, not an admission that the mortgage debt was paid, but that it was assigned.—*Webster City Grocery Co. v. Losey*, 687.
3. **Denial of Corporate Capacity**—Under Code, sections 3627, 3628, requiring a denial of partnership or corporate capacity to specifically allege the facts relied on, a general averment of

Small figures refer to subdivisions of Index. The others to page of report.

## PLEADINGS Continued

## TO

## PRACTICE

want of legal capacity is insufficient—*University of Chicago v. Emmert*, 500.

4. **Election**—In an action for the partition of the estate of a decedent, where the plaintiff claims an interest as a child and heir of the deceased, and afterwards, in an amendment to his petition, alleges that the deceased, "during his lifetime, always recognized the plaintiff as his son," he is not required to elect whether he will claim as a legitimate son or as a recognized illegitimate child.—*Markey v. Markey*, 373.
5. **SAME**—Though defendants qualified as executors under said will, they are not estopped to claim under agreement or deed, they making no claim under the will in the pleadings. Besides, no election or estoppel is pleaded.—*Cloud v. Malvin*, 53.
6. **Payment—Construction**—Answer, of one whose liability was not discharged unless the sum of \$40,000 was paid, that that sum had "substantially, if not wholly," been paid, is insufficient—"Wholly" and "substantially" are not equivalents.—*Hardin Co. v. Wills*, 174.
7. **Relief**—Damages sustained by defendant in an action to quiet title, through the appointment of a receiver for the lands at plaintiff's request, cannot be recovered unless pleaded in the answer.—*Harrington v. Foley*, 287.
8. **Tender in Equity**—An allegation in an answer in an action to quiet title that defendant has at all times been ready and willing to redeem and to pay the lawful amount of taxes, tax sales, penalties and interest chargeable on the property and hereby offers and tenders the same and offers to pay it to plaintiff or into court at any time and keep the tender and offer good whenever ascertained or on demand, is an absolute and unconditional offer to pay the amount due.—*Cone v. Wood*, 260.
9. **Waiver—Proof of Loss**—It is not necessary to state that facts are pleaded for the purpose of showing a waiver or estoppel, as, if they are sufficient, they will be given that effect.—*Stephenson v. Bankers Life Assn.*, 637.

**POLICE MATRONS**—See *MUN. CORP.*, <sup>15</sup>.

**PRACTICE**—See *BEN. ASSOC.*, <sup>8</sup>; *CRIM. LAW*, <sup>19</sup>, <sup>20</sup>, <sup>21</sup>, <sup>27</sup>; *DAMAGES*, <sup>8</sup>, <sup>9</sup>; *ESTATES*, <sup>14</sup>; *EVID.*, <sup>43</sup>; *INSUR.*, <sup>1</sup>, <sup>27</sup>; *INTOX. LIQU.*, <sup>9</sup>; *LIBEL*, <sup>4</sup>; *SURETIES*, <sup>2</sup>; *TAXAT.*, <sup>1</sup>, <sup>2</sup>.

1. **Amendments**—It is within the discretion of the court to refuse an amendment to a pleading, where offered during the course of the trial.—*Rosenberger & Co. v. Marsh & Co.*, 47.

Small figures refer to subdivisions of Index. The others to page of report.

PRACTICE Continued

2. **SAME**—It is not error to refuse an amendment to answer tendering a new issue after plaintiff has closed his evidence and argument.  
—*Gallaher v. Head*, 588.

**Attorneys**—See <sup>3</sup>, <sup>4</sup>, <sup>5</sup>, <sup>6</sup>, *post*.

3. **Authority of Attorney**—Code 1873, section 214, which provides that the court may, on motion of either party to an action, require the attorney for the adverse party to produce or prove the authority under which he appears, and, until he does do so, may stay all proceedings by him in behalf of those for whom he assumes to act, provides the exclusive method of testing the authority of attorneys; and such authority may not be assailed by answer.—*State v. Beardsley*, 396.

4. **Certiorari**—**BY TAX PAYER**—*Review of Ordinances*—A petition to review by certiorari the validity of a city ordinance, by one alleging that he is a citizen and tax payer, will not lie where it does not show that he had any right which was affected by the ordinance not common to all resident tax payers and water consumers.  
—*Collins v. City of Keokuk*, 28.

**Co-tenants**—See <sup>4</sup>, *post*.

**Contracts**—See <sup>6</sup>, <sup>7</sup>, *post*.

5. **Correction of Decree in Blank**—The incompleteness of a decree requiring a conveyance of land on payment of \$—— may be cured by order fixing the amount, made on a motion therefor.  
—*Cooper v. Cook*, 301.
6. **Court and Jury**—**CONSTRUCTION OF CONTRACTS**. The construction of a written contract is for the court and not for the jury, and, if evidence as to the circumstances has been admitted to aid in its interpretation, the court should give the jury the meaning of the writing upon the various hypotheses presented by the evidence.—*Clement v. Drybread*, 701.
7. **SAME**—It is for the court to determine the meaning of an ambiguous written contract, in the light of parol evidence admitted to explain it.—*Idem*.
8. **SETTLEMENT**—*Pleading*—In an action for injuries, defendant pleaded a settlement, to which plaintiff made no reply. Defendant, at the close of the evidence, moved for judgment because such settlement was not denied by the pleadings. *Held*, that it was properly overruled because the settlement was denied by operation of law and plaintiff's testimony tended to show that it was not made in satisfaction of his right to sue; and hence that there was no settlement.—*Stomne v. Hanford Produce Co.*, 137.

**Decrees**—See <sup>5</sup>, *ante*.



## PRACTICE Continued

**Demurrer**—See *42, post.*

9. **Directed Verdict**—Where a note was given in settlement of disputed claims, a direction of a verdict in favor of the payee cannot be sustained, unless the facts essential to make the note valid are so apparent from the evidence that reasonable men could not differ as to the facts it established.—*Morey v. Laird*, 670.
10. **RULE APPLIED**—Defendant employed plaintiff as his agent to exchange his farm at forty-five dollars per acre for the business of a firm, which the firm agreed to do, at the actual cost of their stock, charging nothing for good will. Plaintiff falsely informed the defendant that the firm would not trade unless defendant would give five hundred dollars for the good will of their business and one member of the firm testified that plaintiff informed them that defendant wanted fifty dollars per acre for the farm. The exchange was made on this basis and defendant executed his note to plaintiff in settlement of his claim in ignorance of the fact that the firm had offered to exchange for the farm at forty-five dollars, without anything for the good will, etc. *Held*, that the evidence, if believed, constituted a defense to the note, and should have been left to the jury, and that a verdict directed for plaintiff was error.—*Idem.*
11. **Evidence—OBJECTIONS**—Motion to strike out answer of witnesses to a question as to what the board furnished by plaintiff would be worth a week, made on the ground that she had not shown herself competent to testify, is properly overruled, as the objection should have been made, before the answer, the incompetency being as apparent then as after the answer.—*Murphy v. McCarthy*, 38.
12. **SAME**—Where, in action for injuries sustained by the falling of an elevator, a finding that defendant was negligent was not challenged, objection to testimony that witness considered the elevator unsafe, if human life was involved, going, as it does, to negligence only, is unavailable.—*Stomne v. Hanford Produce Co.*, 137.
13. **MOTION TO STRIKE**—A party should move to strike out the irresponsible part of an answer if he desires to raise the question of its competency.—*McKay v. Johnson*, 610.
14. **Same**—Answer of witness as to what it was worth to keep decedent, "I would not keep her for less than five dollars a week," is subject to motion to strike out as irresponsible.—*Murphy v. McCarthy*, 38.
15. **CHARGE AND PLEA—Waiver**—Where evidence is introduced without objection, it is proper to submit the issue made thereby to

Small figures refer to subdivisions of Index. The others to page of report.

## PRACTICE—EVID.—Continued

- the jury, though not raised by the pleadings.—*Rosenberger & Co., v. Marsh & Co.*, 47.
16. PLEA AND PROOF—Evidence that the principal's refusal to carry out the contract of agency was due to the agent's fault or neglect is admissible, though not pleaded, where the agent had pleaded a wrongful discharge.—*Idem*.
17. TRANSCRIPT AS EVIDENCE—*Exclusions Waived*—Where, by agreement of parties, the testimony of a witness taken on a former trial is read in evidence, all rulings excluding evidence when offered on the first trial are waived.—*Furlong v. Carraher*, 492.
18. EXCEPTIONS—A judgment entry worded, "judgment is rendered \* \* \* against plaintiff for \$1,400, \* \* \* and plaintiff excepts. It is therefore ordered, \* \* \* that the defendant \* \* \* recover \* \* \* judgment for \* \* \* \$1,400," shows that plaintiff excepted to the judgment.—*Clement v. Drybread*, 701.
19. INSTRUCTIONS—Where the transcript on appeal showed that both parties "excepted to each and every instruction given by the court to the jury," such statement was a sufficient exception thereto.—*White v. Elgin Creamery Co.*, 522.
20. *Same*—The words "Given, Plaintiff excepts, Q., Judge," marked on instructions when the charge was given, show sufficient exception to the giving of the instructions.—*Clement v. Drybread*, 701.
- Harmless error—See <sup>51</sup>, *post*.
- Instructions—See <sup>18</sup>, <sup>19</sup>, <sup>20</sup>, *ante*.
21. CONSTRUCTION—The omission of a material issue from a paragraph of a charge wherein the jury are instructed to find for the plaintiff, if they find in his favor on certain issues, is not prejudicial, where such issue is fully covered in another part of the charge.—*Stomne v. Hanford Produce Co.*, 137.
22. CHARGE AND EVIDENCE—An instruction to allow plaintiff the expense, "if any," for nursing is not prejudicially erroneous, where there was no evidence of such expense, as the jury were limited to expense shown.—*Lamb v. City of Cedar Rapids*, 629.
23. CHARGE AND PLEA—It was error to fail to charge that an original contract under which plaintiff and defendant began business should not be considered as affecting the terms of the notes sued on, where the contract was admitted on an issue as to the validity of an account sued on in the same action.—*Clement v. Drybread*, 701.

## PRACTICE—INSTRUCT.—Continued

24. *Same*—An instruction which permits the jury to find on an issue not raised by the pleadings, and concerning which there is no controversy, is erroneous.—*Duncan v. Gray*, 599.
25. *Construing Together*—It is error to charge that all the instructions, and not any one of them, contain the law, because, while a single instruction may not contain all the law applicable to the entire case, it may contain all the law applicable to one phase of it, or to a given state of facts.—*Swanson v. Allen*, 419.
26. **DAMAGES**—In an action for personal injuries, an instruction to allow plaintiff such an amount as “you believe from the evidence he was justly entitled to,” refers as well to future as to past damages, it requires the jury to make such allowance for future damages as it believed from the evidence plaintiff is entitled to, and it is not erroneous for indefiniteness.—*Lamb v. City of Cedar Rapids*, 629.
27. *Same*—An instruction in an action to recover for negligent injuries is not erroneous for failure to give any rule for estimating the amount to be allowed for loss of future earnings, where it tells the jury to consider the abilities of plaintiff to earn wages at the time of the injury and also his ability to earn wages since the injury, and “allow him such amount as you believe from the evidence he is entitled to.”—*Idem*.
28. *Measure of Damages*—At worst for the seller, a contract gave the defendant the option of taking scales on which the seller would make the least profit. Hence, an instruction that the buyer had such an option and that presumably, he would have exercised it had he not broken his contract is not prejudicial to the buyer. The rule of the court assumed that the purchaser's breach caused the least possible harm and it cannot avail *him* to urge that he might have so selected as to cause greater injury by failure to buy.—*Kimball Bros. v. Deere, Wells & Co.*, 676.
29. **DEFINITENESS**—*Request*—It is not erroneous to instruct the jury in a negligence action to allow as damages “such amount as you believe from the evidence he is justly entitled to,” and, in the absence of a request for more definite instructions, such request is sufficient.—*Lamb v. City of Cedar Rapids*, 629.
30. **PREPONDERANCE**—*Harmless Error*—An instruction that by a preponderance of evidence was meant the greater weight and value thereof, and not the greater number of witnesses, though misleading, could not be prejudicial to defendant, where the greater number of witnesses testified for plaintiff.—*Idem*.
31. **REQUEST**—It is error to refuse a specific instruction as to what a plaintiff has the burden of proving, where the only instruction

## PRACTICE—INSTRUCT.—Continued

given on the subject is that plaintiff has the burden of proving the "material allegations" of his petition, without stating what allegations are material.—*Riddle v. Russell*, 591.

32. **SETTING OUT PLEADINGS**—It is error to copy the pleadings into the instructions and read them to the jury in lieu of a concise statement of the issues, where they are obscure, so that the jury is unable to comprehend the issues therefrom. The practice should never be tolerated, unless an absence of prejudice is manifest.—*Swanson v. Allen*, 419.
33. **Interrogatories**—Defendant is properly refused permission to propound interrogatories to the plaintiff where the answer to which they are attached is not filed until too late to obtain the answers before the time set for trial and many of the interrogatories are so unimportant that answers to them should not be required.—*Red Polled Cattle Club v. Red Polled Cattle Club*, 105.
34. **ANSWERS**—In an action by a factor for balance of account, his responses to interrogatories attached to defendant's answer, made from his books and papers, are entitled to the same weight as the accounts themselves.—*Everingham v. Halsey*, 709.
35. **Joinder on Causes**—A cause of action for value of coal taken from land may be joined with one for damages to the land.—*Devin v. Walsh*, 428.

Judgments, See <sup>5</sup>, <sup>18</sup>, *ante*.

36. **Judgments of Stipulation—Waiver of Defective Petition.**—Where a stipulation provides that, if a demurrer to the answer is sustained, judgment shall be rendered for the plaintiff on the petition for the amount claimed, and the demurrer is sustained, defendant cannot question the sufficiency of the petition.—*Goode-now v. Foster*, 508.
37. **JOINT DEFENDANTS**—In an action against a mortgagee of personalty and his agent to enforce preferred claims for labor, the petition alleged that the agent seized and sold the property, and received the proceeds, and that the claims were presented to him. A stipulation was made that, if a demurrer to defendant's answer was sustained, judgment should be rendered for plaintiff on the petition. *Held*, that judgment was properly rendered against both defendants.—*Idem*.
38. **Jurisdiction—SPECIAL APPEARANCE**—Under Code 1873, section 2826, providing that a special appearance to object to the service of notice shall render further notice unnecessary, such appearance gives jurisdiction, regardless of the notice or service.—*Teller v. Equitable M. L. A.*, 17.

## PRACTICE Continued

39. **Jury Trial**—SPECIAL PROCEEDINGS—In the absence of a special provision requiring it, there is no right to trial by jury in condemnation cases.—*In re Bradley*, 476.
40. **SAME**—The provision of Code, section 1947, that in cases of applications under laws Twentieth General Assembly, chapter 186, section 2, to secure the drainage of wet lands, appeals may be taken in the same manner as in the location of roads, does not imply that the method of trial shall also be the same.—*Idem*.
41. **SAME**—An application under laws Twentieth General Assembly, chapter 186, section 2, to secure the drainage of wet lands, is a special proceeding, in which a jury will not be allowed unless specifically provided for.—*Idem*.
- Motion to Strike**—See <sup>11</sup>, <sup>13</sup>, <sup>14</sup> *ante*; <sup>47</sup>, *post*.
- Newly Discovered Evidence**—See <sup>45</sup>, <sup>46</sup>, *post*.
- Objections**—See <sup>11</sup>, <sup>13</sup>, *ante*.
- Pleading**—See <sup>8</sup>, <sup>15</sup>, <sup>24</sup>, *ante*.
- Plea and Proof**—See <sup>16</sup> *ante*.
42. **New Trial**—Remarks of counsel of a nature not to be commended, but purporting to have been made in response to statements of opposing counsel, or to be deductions from facts disclosed by the record, did not require that the party complaining thereof should have a new trial.—*Kimball Bros. v. Deere, Wells & Co.*, 676.
43. **CASUALTY AND MISFORTUNE**—A new trial will not be granted on the ground that judgment by default was rendered by unavoidable casualty or misfortune, within Code, section 4091, where the secretary of defendant corporation, not charged with the management of its affairs, on being served with notice of suit, placed it in a receptacle in his office, in order to have a member of the law firm of which he was also a member prepare an answer, which notice was by him misplaced without mentioning the action to any one, or giving it any further attention.—*Sioux City Vin. Mfg. Co. v. Boddy*, 538.
44. **CO-TENANT**—A defendant, in a partition suit between co-tenants, having a ground for a new trial as against one alleged co-tenant, is not thereby entitled to a new trial as against the others.—*McBride v. McClintock*, 326.
45. **NEWLY DISCOVERED EVIDENCE**—A new trial will not be granted for alleged newly discovered evidence where it is merely cumulative and sufficient diligence to discover it before the trial is not shown.—*Idem*.

## PRACTICE Continued

46. *Rule Applied*—The employment of a different attorney after the trial was had, and his use of diligence in finding evidence which was not introduced at the trial, does not entitle one to a new trial, where his former attorney was lacking in diligence in procuring the evidence.—*Idem*.
47. *PETITION FOR—Motion to Strike*—A plaintiff's motion to strike a defendant's petition in equity for a new trial may be sustained, though a co-defendant, having an interest in the litigation, similar to that of plaintiff, did not join in the motion, where co-defendant was not served with notice of the petition for a new trial.—*Idem*.
48. *Treated as Demurrer*—A motion to strike a petition in equity for a new trial may be treated as a demurrer (conceded for the sake of the argument—*Reporter*.)—*Idem*.
49. *New Issues*—A petition in equity for a new trial, alleging that petitioner is entitled to land in controversy under certain deeds, will not be allowed, where petitioner's original pleading set up a claim under contracts made by letters, because such petition tenders new issues.—*Idem*.
50. *Second Petition*—A second petition for a new trial may be stricken from the files on motion, where it was filed without lawful right.—*Idem*.
51. *Same*—A second application for a new trial will be dismissed although no answer has been filed to it where it was filed more than one year after the decree in the original action was rendered and the moving party is not entitled to relief on any of the grounds enumerated in Code, 1873, section 3164.—*Idem*.
52. *Ruling*—Objection to evidence will be regarded as waived, in the absence of ruling thereon.—*Murphy v. McCarthy*, 38.  
*Special Appearance*—See 38, *ante*.  
*Special Proceedings*—See 39, 40, 41, *ante*.  
*Transcripts*—See 17, *ante*.
53. *Transfer to Equity*—Fraud is triable at law. Therefore, when such is alleged, it is not error to refuse transferring the whole cause to equity, though cancellation of a writing obtained by fraud, be prayed.—*Welch v. Union Cent. Life Ins.*, 224.  
*Waiver*—See 15, 17, *ante*.  
 PRACTICE SUPREME COURT—See APPEAL.  
 PREFERENCES—See BANKS, 1.  
 PRESCRIPTION—See DAMS, 4.  
 PRESIDENTS—See AGENCY, 8, 9; BANKS, 1; EVID., 7, 8, 17.

PRESUMPTIONS Continued

TO

RAILROADS

PRESUMPTIONS—See AGENCY, \*; DIVORCE, \*; EVID., \*; INSUR.,  
 \*, \*, INTOX. LIQU., " ; NOTES AND BILLS, \*; RAIL, " ; SURE  
 TIES, '.

PRINCIPAL AND AGENT—See AGENCY.

PUBLIC LANDS—See DEEDS, \*; HUSB. AND WIFE, '.

## QUIETING TITLE.

1. DEMAND—*Attorney's Fees*—Under laws Twenty-fifth General Assembly, chapter 103, providing that if, before action brought to quiet title, plaintiff shall request of defendant a quitclaim deed, and tender the expense thereof, and the latter fails to comply, the court may, if plaintiff is successful, tax attorney's fees for him, such fees cannot be taxed unless the request was made directly of defendant.—*Lawless v. Stamp*, 601.
2. *Rule Applied*—Demand for deed before bringing suit to quiet title upon an agent of defendant not authorized to make it, is not sufficient to authorize a taxation of an attorney's fee against defendant—*Idem*.

## RAILROADS.

1. Assuming Risk of Employment—Where a railroad company employs a person to remove a pile of slack, and all the dangers incident thereto were obvious to such person, it is not liable for negligence to an employe of such person who is burned by the slack, where it is in the same condition and in the same location when the injuries are received as when the contract was made.—*Branstrator v. K. & W. Ry. Co.*, 377.
2. Master and Servant—An employe of an independent contractor engaged by a railroad company to load slack on cars, cannot recover from the company for personal injuries caused by the falling of a piece of slack, upon the ground that he relied upon the company's promise, made to the contractor's employes, to cool the top of the pile with water, since the promise to repair is only important to rebut the inference that defects are waived by continuance in employment with knowledge of their existence; and as the company had no duty in the premises, the employe waived nothing by continuing in the contractor's employment.—*Idem*.
3. OPERATION OF RAILWAY—*Fellow Servant*—An injury received by a brakeman, while assisting in coaling an engine, through the negligence of a co-employe in operating the hoisting crane so as to knock him from the platform, such movement of the crane not being necessary in order to permit the train to start, "is not an injury in any manner connected with the use and operation of any railroad."—*Reddington v. C., M. & St. P. Ry. Co.*, 96.

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## RAILROADS Continued

4. **Negligence—CARRIERS—*Plea and Proof***—On a petition alleging nothing but an injury to a passenger because of a carrier's negligence, it is error to submit to the jury the question of plaintiff's right to recover, as a trespasser, for gross negligence.—*Fitzgibbon v. C. & N. W. Ry. Co.*, 614.
5. **CONTRIBUTORY NEGLIGENCE**—Plaintiff was driving an empty wagon, and had his head closely bundled up, and testified he listened, but heard no noise of an engine. He stopped two hundred yards from the crossing, and again at the edge of the right-of-way, and looked, and saw nothing coming. When he last looked the snow fence obscured the track, but had he looked after advancing a few feet he could have seen the track for three-fourths of a mile. From the time he first looked till he had reached the track the engine had time to travel to a point out of vision to the crossing. The engineer and superintendent on the engine testified that plaintiff looked over his shoulder, turned around and hurried up his horses; that he was fifty feet from the crossing, and still had time to avoid being struck; that they whistled again, and the engineer testified that he then applied the air. Plaintiff was familiar with the crossing, and knew no train was scheduled to pass, this engine being an extra. *Held*, that plaintiff was guilty of contributory negligence.—*Payne v. C. & N. W. Ry. Co.*, 188.
6. **SAME**—An instruction that, in order to recover for injuries, a passenger must have been free from all fault or negligence contributing to produce the injury, is erroneous, as holding him to the exercise of extraordinary care, and preventing a recovery though the negligence was slight, and did not amount to want of ordinary care.—*Jerolman v. C. G. W. Ry. Co.*, 177.
7. **CROSSING ACCIDENT**—A railroad company permitted the smoke of burning slack to obscure the track at a crossing, all of which plaintiff knew, but there was no evidence that this contributed to the accident. There were cattle guards and snow fences along the right-of-way, but they were properly constructed and located. Plaintiff and four others did not hear the crossing whistle, but the engineer, and two others on the engine with him swore positively that the whistle was sounded at the distance required by law (sixty-rods), and the bell was set ringing. Four others testified to hearing the crossing whistle. *Held*, that negligence was not shown, and this, though the high rate of speed required the whistle to be sounded more than sixty rods from the crossing, since plaintiff, not having heard the signal that was given, would not have heard it had it been given sooner.—*Payne v. C. & N. W. Ry. Co.*, 188.



## RAILROADS Continued

## TO

## RECEIVERS

8. **JURY QUESTION—Evidence**—Whether an employe, loading ties on a car by drawing them in with a pick, saw or ought to have seen a hole in the car floor, through which he stepped a few minutes after he entered the car, is for the jury, notwithstanding testimony that it was in plain sight; he having testified that, though he looked, he did not see or know of it, and that there was snow and straw, over and around it.—*King v. C. & N. W. Ry. Co.*, 749.
9. **Same**—The fact of the wood about the hole in a car floor, through which an employe of the railroad company stepped, being rotten, is sufficient to charge it with notice thereof.—*Idem*.
10. **Passenger—WHO IS—Presumptions**—One who boarded a train knowing that it was run for a particular class of excursionists and that it did not stop at regular stations, and which was not left at a place where an invitation to all persons to take passage therein could be implied, will not be presumed to have been a passenger thereon.—*Fitzgibbon v. C. & N. W. Ry. Co.*, 614.
11. **SAME—Evidence** that plaintiff on inquiring and learning of a conductor of a train, intended for a particular class of excursionists only, when it stopped, said that it would do for him; that he boarded it in the conductor's presence; that he intended to pay his fare, and had the money therefor; and that others not excursionists had been allowed to board the train, sufficiently tend to show that plaintiff was accepted as a passenger to justify the submission of that question to the jury.—*Idem*.
12. **ACCEPTANCE BY CONDUCTOR**—The acceptance, as a passenger, by the conductor of a special excursion train, of one not belonging to the excursion, is binding on the company and he will be treated as a passenger, if he did not know that the conductor exceeded his authority.—*Idem*.

**RATIFICATION**—See *AGENCY*, <sup>10</sup>; *BANKS*, <sup>6</sup>, <sup>7</sup>; *DEEDS*, <sup>1</sup>.

**RECEIVERS.**

1. **Chattel Mortgagee**—A chattel mortgagee of property has an interest therein, within Code, section 3822, authorizing persons having an interest in property in danger of being lost to procure the appointment of a receiver therefor.—*Valley National bank v. Claffin Co.*, 504.
2. **Evidence**—A receiver of personal property in process of manufacture for the market may be appointed in an action to foreclose a chattle mortgage thereon, where, by reason of prior liens, the mortgagee is not entitled to possession, and where it will depreciate unless the manufacture and sale be continued.—*Idem*.

RECEIVERS Continued

TO

RELIG. CORP.

3. **Costs**—A receiver appointed at the instance of the plaintiff in an action to quiet title is, where the validity of his appointment is unquestioned and his report unobjected to, entitled to his commissions and the expenses of his receivership, even though the defendant sustains his claim to the right of possession of the property.—*Harrington v. Foley*, 287.

## REDEMPTION—See MTGES., <sup>10</sup>, <sup>18</sup>; TAXAT., <sup>9</sup>.

1. **Estoppel—Mortgages**—One taking a deed from the mortgagor of the premises, after the first mortgage had been foreclosed, and redeeming from the foreclosure sale, is not estopped, by a recital in her deed that the conveyance is subject to a second mortgage, to allege the subsequent extinguishment of such second mortgage by failure of the holder thereof to redeem from the sale in the foreclosure suit, to which suit he was a party.—*Co-operative S. & L. Association v. Kent*, 146.
2. **BETWEEN LIEN HOLDERS**—A junior lienor redeeming from an execution sale, must file the statement of the utmost amount he is willing to credit on his lien within the ten days given by the statute, or be held to have accepted the property in complete satisfaction of his debt.—*Meredith, Dickey & Co. v. Peterson*, 551.
3. **Same**—It is of no avail that the junior lienor told the clerk at the time of the transaction that he was redeeming under the senior lien, since it did not authorize him to make any entry in the sales book.—*Idem*.
4. **Owners**—The owner of land to which another holds the title as equitable mortgagee is entitled to the statutory period of redemption after a decree fixing the status of the parties.—*Harrington v. Foley*, 287.

## RELEASE—See CONTRACTS, <sup>17</sup>; SURETIES, <sup>3</sup>; TORTS, <sup>1</sup>.

## RELIGIOUS CORPORATIONS.

1. **Departure from Creed—TEST OF MEMBERSHIP—Evidence**—A new pastor of a church taught new doctrines, and a well known leader of the faction professing them called on all who were willing to accept the innovations to take the front seat; this being done expressly to settle misunderstandings as to belief. Shortly thereafter, three leading members who refused to tolerate the new doctrines were notified to be at church and confess, or they would be expelled, and on their failing to do so, the elders dropped their names. No specific charges were given, though demanded; the pretext for the members' dismissal being that they were walking disorderly. *Held*, to show that the new doctrines were made the test of membership, though no formal resolutions were adopted.—*Christian Church v. Carpenter*, 647.

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2. **Rule Applied**—A faction in a church discarded an organ used in the service, discontinued the Sunday school, denouncing certain pamphlets used therein, rejected the practice of receiving aid from outside and taking up collections, adopted the method of voluntary offerings and proclaimed the rule of the elders in place of self-government. The new doctrines were made the test of membership. The former practices of the church were not contrary to anything in the new testament, which was the creed of the church, and were in accordance with the practices of the church generally. *Held*, that the new doctrines and practices were a substantial departure from the doctrines of the church, and their enforcement would be enjoined.—*Idem*.
3. **Trusts—INJUNCTIONS**—The property of a church must be held and used in trust for the promulgation of the generally accepted doctrines of that church, and members departing therefrom and causing a schism therein, will be enjoined from controlling or interfering with its management.—*Idem*.

RULINGS—See PRACTICE, 52.

SALES—See CONSPIRACY; DEEDS, 2; LIENS, 1, 2, 3, 4.

1. **Assumption**—One purchasing without assuming encumbrances, but expecting to pay the valid liens, is not estopped to dispute their validity.—*Waughtal v. Kane*, 268.
2. **Deficiency in Tract—FRAUD**—An owner of a tract of land, which, according to the government plat, contained a certain number of acres, but, according to fixed boundaries, contained much less, conveyed it in gross, describing it as certain fractional quarters of the government survey, the grantee knowing it had been so originally surveyed. The grantor made no covenant or representation as to the number of acres in the tract, except that he merely stated his belief that, if resurveyed according to the original field notes, it would contain the number of acres as therein shown. *Held*, that the grantee was not entitled to recover for a deficiency.—*Lane v. Consigney*, 241.
3. **False Representations**—In an action for the price of land, where the evidence shows that defendant relied on his friendly relations with, and his confidence in, plaintiff, and believed his statements as to the value of the land, and the price which plaintiff had paid for it, and that such statements were false, it was error to direct a verdict for plaintiff.—*Dorr v. Cory*, 725.
4. **Notice to Buyer**—Plaintiff conveyed land by deed, which was recorded; but she remained in possession, and several months afterwards recorded a deed back to her from her grantee, of the same date as the other, and providing that she would support

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TO

SETTLEMENT

him for life, as part of the consideration. Intermediate the recordation of the deeds, an attachment was levied on the land as her grantee's. After the second deed was recorded, a sale was made, under the attachment creditor's judgment, to one who had been told that plaintiff claimed under an unrecorded deed and as a homestead. In fact, the deed back to plaintiff was antedated, not having been made until the day of record. *Held*, that the execution purchaser's rights were subject to plaintiff.—*Zuber v. Johnson*, 273.

5. **Trusts**—Plaintiff conveyed lands in trust for a partnership and the trustee gave a mortgage back to the seller, then, the trustee made contract with defendant to hold part of the land in trust for him in consideration of certain payments to be made by defendant. This contract took note of plaintiff's encumbrance, and while it requires defendant to do certain things it does not provide that he shall have a conveyance when he performs them. After the trustee made this contract with defendant the partnership became a corporation which took all the property of the partnership, including the contract of defendant. This transfer was made subject to all rights of persons having a beneficial interest. The corporation obtained an extension of plaintiff's mortgage, giving defendant's contract as collateral, and plaintiff finally brought suit to recover on his mortgage debt and on said contract as collateral. *Held*:

- a. The rights of the parties to a contract for the conveyance of an interest in land are not affected by a conveyance by the vendors of such contracts to their vendor as collateral security to obtain an extension of time of payment and the purchase price where such contracts were made subject to the encumbrances in favor of the original vendor and required the purchaser to pay his pro rata share of the costs of grading and improving the property, but did not provide for a conveyance of the property contracted for when the required payments should have been made.
- b. Since the corporation took conveyance impressed with a trust, binding on its grantor, the conveyance is no defense, on the ground that the partnership was unable to fulfill the contract.
- c. Since the contract with the trustee contemplated possible changes in the trusteeship the transfer to the corporation subject to the contract did not affect the rights or liabilities of the contract holder.—*Dorr v. Cory*, 725.

**SATISFACTION**—See **JUDGMENTS**, 1.

**SAVINGS BANKS**—See **NOTES AND BILLS**, 16.

**SETTLEMENT**—See **AGENCY**, 4; **FACTORS**, 1, 2; **PRACT.**, 2.

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## TAXATION

1. **Consideration**—A note given in settlement of claims of doubtful validity is valid, if the maker had knowledge of all the facts affecting their validity at the time he executed it.—*Morey v. Laird*, 670.
2. **Same**—The issue of compromise and settlement of a servant's claim against his master for personal injuries is properly submitted to the jury upon conflicting evidence that the payments made to and retained by the servant were merely on account of wages and expenses attending his injury and were not intended as a settlement of the claim.—*Stomne v. Hanford Produce Co.*, 137.

**SIDEWALKS**—See MUN. CORP., <sup>1</sup>, <sup>2</sup>, <sup>4</sup>, <sup>5</sup>.

**SPECIAL APPEARANCE**—See PRACT., <sup>22</sup>.

**STATUTE OF FRAUDS**—See EVID., <sup>53</sup>.

**STATUTE OF LIMITATIONS**—See BREACH OF PROMISE, <sup>2</sup>,  
FRAUD. CONV., <sup>8</sup>; LIM. OF ACTIONS.

**STATUTES**—See CONST. LAW, <sup>2</sup>; LIM OF ACT., <sup>1</sup>.

**STAY BONDS**—See BONDS, <sup>4</sup>.

**STREET RAILROAD**—See HIGHWAYS.

**STREETS**—See MUN CORP., <sup>3</sup>.

**SUICIDE**—See INSUR., <sup>22</sup>, <sup>23</sup>, <sup>24</sup>, <sup>25</sup>.

**SURETIES**—See NOTES AND BILLS, <sup>11</sup>; PAYMENT, <sup>3</sup>.

1. **Indemnity to**—*Consideration*—An agreement to save a surety harmless, if he would execute a bond, made to induce the surety to sign, is not without consideration.—*Seeberger v. Wyman*, 527.
2. **RIGHT OF ACTION**—*Judgment Against Surety*—A surety is not precluded from maintaining an action to ascertain the liability of others on an agreement to save him harmless, because no judgment had been rendered against him on his obligation, where, by the bond, his obligation was fixed by a judgment against his principal.—*Idem*.
3. **RELEASED BY APPEAL**—A surety on a bond executed to a receiver, in an action for payment of such judgment as the court might direct, is not released by his principal taking an appeal, where he knew that the appeal was taken, and assented, thinking it might release him, and where it was not authorized or assented to by the receiver.—*Idem*.
4. **Presumptions**—Where it does not appear when a surety took up the note, it may be presumed that he did so at maturity.—*Heaton v. Ainley*, 112.

**TAXATION**.—See INTOX. LIQU., <sup>16</sup>; LIM. OF ACT.

1. **Assessment**—**ERRONEOUS ENTRY**—*Remedies*—Where an excessive assessment was entered on the rolls through a clerical error

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## TAXATION Continued

- in copying, and without the assessor's knowledge, the tax payer is not precluded from questioning the amount thereof because he did not go before the board of equalization for relief before beginning mandamus to compel the county auditor to correct the same, or before paying the tax under protest, and beginning an action to recover the taxes paid in excess of the true assessment. —*Smith v. McQuilton*, 363.
2. **SAME**—The power conferred upon the county auditor by Code of 1873, to correct any clerical or other error in the assessment or tax book, includes the power to determine when a mistake has been made, and the word "mistake" covers all cases where the record does not disclose the true facts and the word "error" includes a mistake in copying an assessment into the assessment roll, in consequence of which it is larger than the actual valuation fixed by the assessor.—*Idem*.
  3. **Paving Assessment—FRAUD—Rights of Tax Payer**—Fraud of a contractor in not using in the construction of a curbing the amount of cement required by the contract, so that a portion of the curbing is inferior to that agreed to be built, combined with the failure of the proper authorities to discover such defect and insist on its being remedied, vitiates the acceptance of such portion, and renders void the assessment of property abutting thereon, though the authorities were not guilty of actual fraud; and an injured tax payer may maintain an action to set aside the special assessment for the cost of the improvement.—*Mason v. City of Des Moines*, 658.
  4. **INTEREST**—Acts Twenty-second General Assembly, chapter 5, amending Acts Twenty-first General Assembly, chapter 168, section 12, provides that assessments for paving streets shall be payable to the county treasurer, with 6 per cent. interest, and collected in the same manner and bear the same penalties as provided for the collection of other taxes, Code 1873, sections 478, 479, provides that assessments may be collected by suit either in the name of the municipality or the person to whom it shall have directed payment, and that in case of default in payment the municipality may recover, in addition to the amount assessed and interest at 10 per cent., 5 per cent. for expenses of collection. *Held*, that a private person suing to recover the assessment is entitled to only 6 per cent. interest.—*Des Moines Brick Mfg. Co. v. Smith*, 307.
  5. **LIENS—Priority**—The lien of street-paving certificates inferior in point of time to a lien based upon the certificates issued for curbing the same street is not superior to the latter lien.—*Idem*.

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6. **Sale—FRAUD—Evidence**—The existence of a fraudulent combination among bidders at a tax sale cannot be inferred from the fact that there was little competition, though a number of bidders were present, several of whom bid on the same tract.—*Gallagher v. Head*, 588.
7. **Limitation of Action—OCCUPANCY**—The occupancy by the fee owner through tenants, which will set the statute of limitations in motion and keep it running against a tax title, need not be continuous by the same person.—*Idem*.
8. **Same**—The statute limiting a tax purchaser's right to recover the land begins to run when his right to a deed accrues, though he does not take one until thereafter, if the fee owner then occupies the land, and has done so since the sale; and the running of the statute is not interrupted by a change in the fee title during the period of limitation.—*Idem*.
9. **REDEMPTION—Abandonment**—After the rendition of a decree entitling a land owner to redeem from a tax sale, he paid the redemption money to the clerk, but the tax sale purchaser refused to accept it, because he thought there was no redemption, whereupon the former moved to compel a conveyance from the latter through the clerk, and the motion was denied, whereupon the former withdrew his money, and the latter and his grantee remained in possession for 15 years. *Held*, that the former had abandoned his right to redeem.—*Cooper v. Cook*, 301.
10. **Validity—PURCHASE BY CO-OWNER OF MORTGAGE**—Where land is assessed for taxes as one parcel, which is owned by two in severalty, a mortgagee of one owner cannot purchase the entire parcel at a tax sale, and acquire title, so as to divest the other owner.—*Cone v. Wood*, 260.
11. **SAME**—The purpose of a mortgagee in taking and assigning tax sale certificates does not go to the validity of the tax sale.—*Idem*.
12. **Rule Applied**—Where a party seeks to perfect his title under tax deeds, he must have the support of a valid tax title; hence the purpose of a party through whom he claims in taking an assignment of the certificate is immaterial, since it does not go to the validity of the tax sale.—*Idem*.
13. **Waste**—A tax purchaser is entitled to recover of the fee owner for timber which the latter tenant, acting under a right which the owner pretended to confer, cut while the land was wrongfully withheld from the purchaser.—*Gallagher v. Head*, 588.

**TENANCY**—See **TAXAT.**, 7, 8.

**TENDER**—See **MORTGAGES** 2; **PLEAD.**, .

**TITLE**—See **EVID.**, 18, 64.

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TORTS

TO

TRUSTS

**TORTS.**

1. **Joint Tort Feasors—RELEASE OF ONE**—Where creditors of a debtor employed the same attorney, and separate attachments on their debtor's property are levied on the creditors' claims, neither creditor being in any way interested in the other's claim or its prosecution, they are not joint tort feasors, where the attachments were improperly levied, so that a release as to one of them would discharge the other, as against a claim for damages by the attachment debtor.—*Miller v. Beck & Co.*, 575.
2. **SATISFACTION BY ONE—Attachment**—The payment by one of two wrongful attaching creditors of a judgment for the damages sustained by the debtor from the levy on certain goods of the two writs, but made at the same time and by the same officers, is a bar to an action against the other creditor for the trespass, as it was a single act with one purpose.—*Idem*.
3. **Same**—Attachment writs were unlawfully levied by distinct creditors upon the same property at the same time. Thereafter the attachment debtor recovered against one of the creditors damages for such unlawful attachment, and the judgment was satisfied. *Held*, that such satisfaction was a bar to a subsequent action against another of such attachment creditors to recover damages, except as to any costs made on his writ independent of those made under the writ for the levy for which damages were recovered, and for attorney's fees.—*Idem*.
4. **Same**—Complete satisfaction for an injury operates to discharge all who are liable therefor, whether they be joint and several wrong doers, or several wrong doers, or though the party satisfying is in nowise liable for the injury.—*Idem*.

TRANSFER—See PRACT., <sup>53</sup>.TROVER—See FRAUD. CONV., <sup>2</sup>.**TRUSTS**—See BANKS, <sup>2</sup>, <sup>4</sup>; EVID. <sup>44</sup>, <sup>46</sup>; SALES, <sup>5</sup>.

**Resulting Trust**—A father about to move his family west, sent one of his sons to look up a location, and he, with the proceeds of the sale of the father's farm in the east, purchased a farm, taking the title in the name of himself and another brother. The family then settled on the farm, working it jointly. Two of the daughters, on their marriage, removed therefrom, and the brother who purchased it, also left it, first making a conveyance to the brother in whose name, jointly with himself, he had taken the conveyance, for a nominal consideration. This brother thereafter conveyed to an unmarried sister, and she, being in failing health, conveyed back to the brother who had purchased the lands. This brother thereafter conveyed part of the tract to his

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## TRUSTS Continued

## TO

## WILLS

wife. No consideration was paid for any of the conveyances, and two sisters, who never married, resided on the land until their death, and, with the exception of the brother purchasing the farm, the other brothers resided thereon until they became unable to work it. *Held*, that, on purchasing the lands with the money furnished by his father and taking the title in himself and brother, a trust resulted in favor of all the children, subject to which the wife took, it being within the saving clause of Code 1873, section 1934, requiring declarations of trust in relation to real estate, except trusts resulting from the operation of law, to be executed in the same manner as deeds.—*Williams v. Williams*, 91.

TRYCICLES—See MUN. CORP., <sup>1</sup>, <sup>14</sup>.

VENUE—See INSUR., <sup>27</sup>.

VERDICT.—See APPEAL, <sup>27</sup>, <sup>39</sup>; DAMAGES, <sup>7</sup>.

WAIVER.—See APPEAL, <sup>27</sup>, <sup>34</sup>; BENEFIT ASSOCIATIONS, <sup>3</sup>, <sup>4</sup>; FACTORS, <sup>1</sup>; INSUR. <sup>16</sup>, <sup>19</sup>, <sup>20</sup>, <sup>22</sup>; PLEAD., <sup>2</sup>.

WASTE.—See TAXAT., <sup>12</sup>.

WILLS—See APPEAL, <sup>20</sup>; ESTATES, <sup>16</sup>.

1. **What is**—An instrument executed and witnessed as provided for in a case of a will, and intended as such by deceased, is such though reciting, "I agree to will."—*In re Estate of Longer*, 34.
2. **Construction**—The word bequest may be held to refer to real estate in one part of a will where the testator has plainly used it with that meaning in another part.—*In re Stumpenhousen's Estate*, 555.
3. **RULE APPLIED**—When a will giving personal property and a life estate in real property, with power "to change or modify the specific bequests hereinafter made," uses interchangeably the words "bequest" and "devise," it will not be held that the power to change or modify refers only to personal property, on the ground that the word "bequest" is used.—*Idem*.
4. **Life Estates**—A joint will, devising property to the survivor during life to use as he sees fit, without power to sell, but with a right to change the disposition of property as provided for by the will, gives to the survivor only a life estate and the power to dispose of the remainder as a separate estate.—*Idem*.
5. **Effect of**—A will devising a life estate, with power to the life tenant to alter the devise of the remainder, does not give the remainder men any vested interest, and if the power is exercised, the persons designated by the life tenant take under the original will.—*Idem*.

## WILLS Continued

6. **Language to Create**—No set form of words is requisite to the creation of a will, any language indicative of an intent to make a testamentary disposition of property being sufficient.—*Idem*.
7. **Evidence—OPINION OF SUBSCRIBING WITNESS**—In a contest over a will on the ground of mental incapacity to make a will, it is not competent to ask a subscribing witness what was the testator's "capacity to make a will," as such question calls for a decision of the whole case.—*Furlong v. Carraher*, 492.
8. **SAME**—A question calling for the opinion of a subscribing witness to a will, as to the condition of the testator's mind, based upon the testimony given by him before the jury, is not competent where the witness has not testified to any facts tending to prove unsoundness of mind, and this, though a subscribing witness may, if asked, give his belief as to testator's mind, without stating the grounds of the belief.—*Idem*.
9. **TESTAMENTARY CAPACITY**—One who at seventy-seven, loses her husband, and who then begins to manifest less and less independence of action, whose memory becomes continually poorer; loses sympathy for her family, forgets the burial of her children in Scotland, whom she formerly remembered with the greatest affection; who becomes penurious; who repeats old stories frequently in the same conversation; who evinces no sorrow nor appreciation at the death of her husband; who continually repeats questions in the same conversation; objects to her son's acting as administrator of her husband's estate; forgets the execution of papers within a few minutes; complains of inattention of her children, who frequently call upon her; who becomes very much attached to a grandson who lives with her, and attends his wedding, but does not know he was married nor to whom, though he married the girl who was then working for her, and whose mental decadence continues for seven years, at which time she makes a disposition of her property in favor of that grandson, although she has children living whom she ignores, has not the capacity to dispose of her property by deed or will.—*Galt v. Provan*, 561.
10. **UNDUE INFLUENCE**—Evidence that a son of a testatrix, a woman of advanced years and rather weak of mind, took charge of her farm and the personal property kept thereon, and largely directed the disposition of the same while his mother was living, is not sufficient to show undue influence over the mother in the execution of her will, it not appearing that the son had anything to do with the making of that instrument.—*Furlong v. Carraher*, 492.

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